No. 83 535

Office-Supreme Court, U.S.
FILED
SEP 26 1983
ALEXANDER L. STEVAS,
CLERK

83 535

# In the Supreme Court of the United States

OCTOBER TERM, 1982

---

**MARSHFIELD FAMILY SKATELAND, INC., THOMAS F. VETRA, OCEAN STREET CANTEEN, INC., BONNIE PARKERS, INC., VENUS II, INC., H & M ENTERPRISES, INC., BP PRODUCTIONS, INC., and MARSHFIELD SPORTS CENTER, INC.,**

*Appellants,*

vs.

**TOWN OF MARSHFIELD,**

*Appellee.*

---

On Appeal From The Supreme Judicial Court For The Commonwealth Of Massachusetts

---

## JURISDICTIONAL STATEMENT

---

IRA H. ZALEZNIK
BARRY E. ROSENTHAL
VALERIE L. PAWSON
LEWIN & ROSENTHAL
63 Atlantic Avenue
Boston, Massachusetts 02110
(617) 227-9400

JONATHAN T. HOWE
BARRY SULLIVAN*
DONALD J. RENDALL, JR.
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

*Attorneys for Appellants*

* Counsel of Record

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

## QUESTIONS PRESENTED*

1. Whether Town of Marshfield General By-Law No. 48, which prohibits the commercial operation of all but a few specified "automatic amusement device[s]," and which clearly includes video games within this ban, impermissibly abridges the freedom of speech and association guaranteed by the First Amendment and is unconstitutionally overbroad.

2. Whether Town of Marshfield General By-Law No. 48, which prohibits the commercial operation of any "automatic amusement device," including video games, but expressly exempts "private in-home use, coin operated juke boxes, pool, billiard, bowling and athletic training devices," and does not purport to prohibit any other form of group amusement or entertainment, violates the due process and equal protection clauses of the Fourteenth Amendment.

---

* In addition to the parties listed in the caption, John D. Gunn was a party below. He is no longer engaged in this business and has not joined in this appeal. None of the corporate parties has any parent, subsidiary or affiliate. 28 U.S.C. §2403(b) may be applicable.

# TABLE OF CONTENTS


| | PAGE |
|---|---|
| Questions Presented For Review | i |
| Table Of Authorities | iii |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Constitutional And Statutory Provisions Involved | 2 |
| Statement Of The Case | 3 |
| The Questions Are Substantial | 10 |
| I. This Case Involves Substantial Questions Under The First Amendment. | 10 |
| II. This Case Involves Substantial Questions Under The Fourteenth Amendment. | 19 |
| Conclusion | 23 |
| Appendix A | App. 1 |
| Appendix B | App. 15 |
| Appendix C | App. 19 |
| Appendix D | App. 20 |
| Appendix E | App. 21 |
| Appendix F | App. 22 |
| Appendix G | App. 32 |
| Appendix H | App. 37 |
| Appendix I | App. 38 |
| Appendix J | App. 39 |
| Appendix K | App. 40 |
| Appendix L | App. 57 |

# TABLE OF AUTHORITIES

*Cases*

PAGE

Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607 (7th Cir.), *cert. denied*, 103 S.Ct. 176 (1982) ..... 13

Broadrick v. Oklahoma, 413 U.S. 601 (1973) ..... 18

Carey v. Population Services International, 431 U.S. 678 (1977) ..... 14

Caswell v. Licensing Comm'n for Brockton, 387 Mass. 864 (1983) ..... 8, 10

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) ..... 10

City of Mesquite v. Aladdin's Castle, Inc., 451 U.S. 981 (1981) ..... 10

City of Mesquite v. Aladdin's Castle, Inc., 630 F.2d 1029 (5th Cir. 1980), *rev'd in part and remanded*, 455 U.S. 283 (1982) ..... 10

Coates v. City of Cincinnati, 402 U.S. 611 (1971) .... 17

Cohen v. California, 403 U.S. 15 (1971) ..... 11, 12

Cossack v. City of Los Angeles, 11 Cal.3d 726, 523 P.2d 260 (1974) ..... 21

Craig v. Boren, 429 U.S. 190 (1976) ..... 14

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) ..... 11

Dunn v. Blumstein, 405 U.S. 330 (1972) ..... 20

Eisenstadt v. Baird, 405 U.S. 438 (1972) ....14, 20, 22, 23

Elrod v. Burns, 427 U.S. 347 (1976) ..... 16

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 11

PAGE

Fantasy Book Shop, Inc. v. City of Boston, 652 F.2d 1115 (1st Cir. 1981) ..... 18

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) ..... 15, 16

414 Theatre Corp. v. Murphy, 360 F.Supp. 34 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 1155 (2d Cir. 1974) ..... 18

F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) ..... 19

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) .... 17

Grayned v. City of Rockford, 408 U.S. 104 (1972) ..... 18

Griswold v. Connecticut, 381 U.S. 479 (1965) ..... 17, 22

Jenkins v. Georgia, 418 U.S. 153 (1974) ..... 11

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) .. 11, 12

Kaplan v. California, 413 U.S. 115 (1973) ..... 14

Looff v. City of Long Beach, 153 Cal.App.2d 174, 314 P.2d 518 (1957) ..... 21

Marshfield Family Skateland, Inc. v. Town of Marshfield, 389 Mass. 436, 450 N.E.2d 605 (1983) ..... 1

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) ..... 16, 20

Midway Mfg. Co. v. Artic International Inc., 704 F.2d 1009 (7th Cir. 1983) ..... 13

Midway Mfg. Co. v. Bandai-America, Inc., 546 F.Supp. 125 (D.N.J. 1982) ..... 13

Midway Mfg. Co. v. Dirkschneider, 543 F.Supp. 466 (D.Neb. 1981) ..... 13

Moore v. City of East Cleveland, 431 U.S. 494 (1977) .. 19

NAACP v. Alabama, 357 U.S. 449 (1958) ..... 17

NAACP v. Button, 371 U.S. 415 (1963) ..... 11, 17

PAGE

People v. Glaze, 27 Cal.3d 841, 614 P.2d 291 (1980) .... 18

People v. Palazzolo, 62 Mich.App. 140, 233 N.W.2d 216 (1975) ..... 21

Plyler v. Doe, 457 U.S. 202 (1982) ..... 20

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) ..... 20

Railway Express Agency v. New York, 336 U.S. 106 (1949) .....20, 23

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) .....12, 15

Reed v. Reed, 404 U.S. 71 (1971) ..... 20

Schacht v. United States, 398 U.S. 58 (1970) .....11, 15

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) .....10, 11, 14, 15-16, 18, 19

Schneider v. State, 308 U.S. 147 (1939) ..... 16

Shapiro v. Thompson, 394 U.S. 618 (1969) ..... 20

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) ..... 11

Stanley v. Georgia, 394 U.S. 557 (1969) ..... 15

State v. Bloss, 613 P.2d 354 (Hawaii 1980) ..... 21

Stern Electronics, Inc. v. Kaufman, 669 F.2d 852 (2d Cir. 1982) ..... 13

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) ..... 20

United States v. O'Brien, 391 U.S. 367 (1968) ..... 16

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) ..... 16

PAGE

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) ..... 15

WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622 (7th Cir. 1982) ..... 13

Williams Electronics, Inc. v. Artic International, Inc., 685 F.2d 870 (3d Cir. 1982) ..... 13

Winters v. New York, 333 U.S. 507 (1948) ..... 11, 12

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) ..... 15

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) ..... 11

*Constitutional Provisions*

First Amendment ..... *passim*

Fourteenth Amendment ..... *passim*

*Statutes and Rules*

17 U.S.C. § 101 *et seq.* ..... 12

17 U.S.C. § 102(a) ..... 12-13

28 U.S.C. § 1257(2) ..... 2

28 U.S.C. § 2403(b) ..... i

Mass. Gen. Laws Ann. ch. 40, § 32 ..... 3

Mass. Gen. Laws Ann. ch. 140 § 177A ..... 3, 7

Town of Marshfield General By-Law No. 48 ..... *passim*

Town of Marshfield Zoning By-Laws, Article V ..... 4, 7, 8

Mass.R.App.P. 11 ..... 7

*Legislative Materials*

H.R.Rep.No. 94-1476, 94th Cong., 2d Sess. (1976) ..... 13

# In the Supreme Court of the United States

OCTOBER TERM, 1982

---

## NO.

---

**MARSHFIELD FAMILY SKATELAND, INC., THOMAS F. VETRA, OCEAN STREET CANTEEN, INC., BONNIE PARKERS, INC., VENUS II, INC., H & M ENTERPRISES, INC., BP PRODUCTIONS, INC., and MARSHFIELD SPORTS CENTER, INC.,**

*Appellants,*

VS.

**TOWN OF MARSHFIELD,**

*Appellee.*

---

On Appeal From The Supreme Judicial Court For The Commonwealth Of Massachusetts

---

## JURISDICTIONAL STATEMENT

---

### OPINIONS BELOW

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (App. A, *infra*, App. 1-14) is reported at 389 Mass. 436 and 450 N.E.2d 605 (1983). The opinion of the Superior Court for Plymouth County (App. B, *infra*, App. 15-18) is not reported.

## JURISDICTION

The judgment of the Supreme Judicial Court of Massachusetts was entered on June 13, 1983 (App. C, *infra*, App. 19). A timely petition for rehearing was denied on June 29, 1983 (App. D, *infra*, App. 20). The notice of appeal was filed on September 7, 1983 (App. E, *infra*, App. 21). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble * * *.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Town of Marshfield General By-Law No. 48 provides:

> (1) No person shall keep, or cause to be kept, operate or suffer to be operated, on premises owned or leased by him, or subject to his control, any mechanical or electronic automatic amusement device, whether coin-operated or not (as defined under, but not limited to, Chapter 140, Section 177A(2) of the Massachusetts General Laws) except private in-home use, coin-operated juke boxes, pool, billiard, bowling and athletic training devices.
>
> (2) Any person found violating the provisions of this by-law will be punished by a fine of $200.00 for each offense.

## STATEMENT OF THE CASE

1. The Town of Marshfield is a body corporate and politic organized under the laws of the Commonwealth of Massachusetts. The Town is a summer resort, with a year-round population of approximately 20,000 residents. General By-Law No. 48, which was enacted at a June 1982 town meeting attended by about 200 residents, prohibits the operation of all "mechanical or electronic amusement device[s], whether coin-operated or not," with the exception of "private in-home use, coin-operated juke boxes, pool, billiard, bowling and athletic training devices."[1] Each violation of the by-law is punishable by a $200 fine. The same town meeting rejected a by-law proposed by the Board of Selectmen, which would have regulated coin-activated amusement devices through a licensing system, but would not have prohibited their use (S.J.C. App. 20). General By-Law No. 48 became effective on September 30, 1982, when approved by the Massachusetts Attorney General. *See* Mass. Gen. Laws Ann. ch. 40, §32 (West Supp. 1983).

On October 6, 1982, nine merchants of the Town of Marshfield, including appellants, commenced this action for declaratory and injunctive relief in the Superior Court for Plymouth County, claiming that General By-Law No. 48 violated the Constitution and laws of Massachusetts as well as the First and Fourteenth Amendments to the

---

[1] An automatic amusement device has been defined by the Great and General Court as "any mechanism whereby, upon the deposit therein of a coin or token, any apparatus is released or set in motion or put in a position where it may be set in motion for the purpose of playing any game involving, in whole or in part, the skill of the player. . . ." Mass. Gen. Laws Ann. ch 140, §177A(2) (West 1974). The definition contained in General By-Law No. 48 purports to include, but not be limited to, this statutory definition.

United States Constitution (S.J.C. App. 13-18). This action was consolidated with five other cases that had been filed in the Superior Court shortly before General By-Law No. 48 became effective (S.J.C. App. 27). The Marshfield Building Inspector had commenced those actions to enjoin the maintenance of coin-activated amusement devices on the business premises maintained by John D. Gunn, Thomas F. Vetra, Ocean Street Canteen, Inc., BP Productions, Inc., Bonnie Parkers, Inc., Venus II, Inc., and H & M Enterprises, Inc., on the alleged ground that the maintenance of such games was prohibited by Article V of the Marshfield zoning by-laws (App. L, *infra*, App. 57-61).[2] The defendants in those cases claimed that the zoning by-laws either did not prohibit the maintenance of coin-activated amusement devices on their premises or, alternatively, that the zoning by-laws were illegal and unconstitutional as so applied.

The businesses operated by appellants include a bowling alley, a skating rink, three general stores, one restaurant and three taverns (App. K, *infra*, App. 40-43). Appellants have operated coin-activated video games, as an adjunct to their principal businesses, for periods up to 10 years (App. K, *infra*, App. 40-43). Appellants are not principally engaged in the business of operating video games and none of these businesses is an "arcade" (App. K, *infra*, App. 40-43). Marshfield Sports Center, Inc., which operates a bowling alley, has approximately eight video games at its business premises (App. K, *infra*, App. 43). The other appellants each operate four or fewer video games (App. K, *infra*, App. 40-43).

The video games operated by appellants utilize a television monitor and computer technology to present to the viewer a continuous visual display with accompanying

---

[2] No such action was brought against appellants Marshfield Family Skateland, Inc. or Marshfield Sports Center, Inc.

sound effects, which may include simulated human voices (App. K, *infra*, App. 47-49). The video display closely resembles an animated motion picture or "cartoon." A viewer may "play" the game by depositing a coin, which activates the game's "play mode" and thereby allows the player, through the use of certain controls, to interact with and manipulate the video display. The various video games embody different stories or plots, depicting the various ideas and fantasies of their authors. The plots of many video games, such as "Donkey-Kong" (one of the games involved here), involve a struggle between forces of good and evil.[3] The plot of the game is acted out on the video screen in the "play mode." The player, by manipulating the controls, usually takes the part of the game's main character and acts out that character's part in the game or fantasy. The objective of the game is for the player skillfully to instruct his character to prevail in the dramatic plot presented in the game by performing in a manner that scores points.

It is undisputed that General By-Law No. 48 would, if valid, prohibit appellants from continuing to operate the video games which they maintain at their business premises.

2. On October 6, 1982, the Superior Court denied appellants' motion for a preliminary injunction (S.J.C. App. 1). On appeal from that order, the Town stipulated that it would not enforce the by-law pending a decision on the merits by the Superior Court. In expedited proceedings before the Superior Court, the parties submitted an agreed

---

[3] Numerous other video games are involved in this case, including "Pac-Man," "Ms. Pac-Man," "Zaxxon," "Kangaroo," and "Tron," which are described in the parties' agreed statement of facts (App. K, *infra*, App. 49-52).

statement of facts, which describes the parties, the procedural history of the cases, the technology and operation of video games, and the video game industry (App. K, *infra*, App. 40-56). The agreed statement also recites the existence in Marshfield of several other restaurants and taverns which serve alcoholic beverages, operate jukeboxes and pool tables, and offer live entertainment and dancing to the public (App. K, *infra*, App. 55-56).[4]

On November 8, 1982, the Superior Court entered judgment in favor of the Town in all of the consolidated cases

---

[4] Appellants also presented a videotape demonstration of five video games and a written explanation of the videotape, which are part of the record (*see* S.J.C. App. 126-27). Because the trial court had precluded the parties from adducing any evidence as to the social value of video games, the parties submitted offers of proof, in the form of affidavits, on that issue. Appellants offered an affidavit prepared by Dr. B. David Brooks, an expert on juvenile crime and delinquency (S.J.C. App. 128-45), who had done extensive empirical research and concluded that video games actually have a beneficial effect upon adolescent development, rather than the detrimental effect sometimes attributed to them.

For its part, the Town offered to prove that a significant number of "unmarried men under 21 years of age visit Marshfield during the summer months and that "concentrations of young males, particularly in the beach areas . . . , increase[] the potential for disorderly conduct and the burden on the Police Department . . ." (S.J.C. App. 147). The Town also offered to prove that the installation of two video games in an ice cream shop in a large shopping center in some unidentified Massachusetts town had resulted in "as many as 30 to 35 teenaged boys . . . constantly hanging about the shop," causing a nuisance and driving away customers from other nearby stores (S.J.C. App. 147-48). Finally, the Town offered the affidavit of Thomas R. Jackson, the author of General By-Law No. 48, who stated his belief that video games contribute to juvenile delinquency by allegedly causing youths to associate with "undesirable" adults, spend large sums of money on the games, gamble, buy and sell illegal drugs, and miss school (S.J.C. App. 149-52).

(App. F, *infra*, App. 22-31). The Superior Court declared that General By-Law No. 48 "does not violate any right to free speech, due process of law, and equal protection of the laws as guaranteed by the First and Fourteenth Amendment[s]" (App. F, *infra*, App. 22) and also upheld the applicability, legality, and constitutionality of Article V of the zoning by-laws (App. F, *infra*, App. 25).

The Massachusetts Appeals Court granted a stay pending appeal (App. H, *infra*, App. 37). Appellants filed timely notices of appeal to the Appeals Court (App. G, *infra*, App. 32-36), and the Supreme Judicial Court thereafter granted their application for direct appellate review. *See* Mass. R. App. P. 11.

3. Appellants contended in the Supreme Judicial Court that General By-Law No. 48 and the zoning by-laws, as applied, violate the First Amendment by prohibiting the presentation of video game entertainment to the public. Appellants also contended that the by-laws are impermissibly overbroad because, in addition to prohibiting video games, they outlaw many forms of commercial entertainment that have been held to be protected, such as coin-activated movies and "peep shows." Appellants also contended that the by-laws violate their rights to due process and equal protection because the by-laws ban some coin-activated automatic amusement devices, while exempting other coin-activated amusement devices and permitting other forms of group amusement and recreation, and serve no legitimate governmental interest.[5]

---

[5] Appellants also contended that the by-laws violate the Massachusetts Declaration of Rights and Mass. Gen. Laws Ann. ch. 140, §177A (West 1974 and Supp. 1983), which authorizes local government units to license coin-activated amusement devices. The Supreme Judicial Court rejected these contentions as well (App. A, *infra*, App. 4-7, 8-14).

Summarily rejecting each of appellants' contentions concerning the validity of General By-Law No. 48 (*see* App. A, *infra*, App. 4), the Supreme Judicial Court affirmed all of the judgments below (App. C, *infra*, App. 19). Based on its view that the judgments in each of the consolidated cases could be affirmed under General By-Law No. 48, however, the Court declined to address any of the issues raised with respect to the zoning by-laws (App. A, *infra*, App. 4).

The Court first held that video games are not protected by the First Amendment because "video games . . . are, in essence, only technologically advanced pinball machines" and " 'any communication or expression of ideas that occurs during the playing of a video game is purely inconsequential' " (App. A, *infra*, App. 8; quoting *Caswell* v. *Licensing Comm'n for Brockton*, 387 Mass. 864, 871 (1983)). The Court also rejected appellants' claim that General By-Law No. 48 was impermissibly overbroad, holding that the by-law's undisputed prohibition of coin-activated movies did not constitute any overbreadth sufficiently "substantial" to warrant its invalidation (App. A, *infra*, App. 8-10).

Since the Court found that General By-Law No. 48 did not implicate any "protected rights of freedom of expression" (App. A, *infra*, App. 10), the Court rejected appellants' due process and equal protection claims under the rational basis test. The Court found that the Town's "possible purposes" in enacting the by-law might have been to prevent noise, traffic, and congestion, and the congregation of young males under 21 years of age during the summer months (App. A, *infra*, App. 12).[6] Although

---

[6] On appeal, the Town noted the existence of five "facts" upon which it "could have" relied in enacting General By-Law No. 48. First, most video game patrons are males under the age of 25, "who

(footnote continued)

the Court noted (App. A, *infra*, App. 12) that General By-Law No. 48 "might have been drawn more narrowly, for example, to prohibit the operation of these games during only the summer season," it nevertheless concluded that the by-law satisfies due process because it bears a reasonable relation to these objectives, which it found to be permissible (App. A, *infra*, App. 12-13). Finally, the Court held that the by-law's distinction between prohibited automatic amusement devices on the one hand, and the exempt devices and other games and recreation on the other, is neither arbitrary nor irrational (App. A, *infra*, App. 13-14).

4. Appellants thereafter filed a timely petition for rehearing and, in the alternative, a petition for a stay pending appeal to this Court. The Supreme Judicial Court denied both petitions on June 29, 1983 (App. D, *infra*, App. 20). On appellants' application, however, a stay was granted by Justice Brennan on July 12, 1983 (App. J, *infra*, App. 39). The notice of appeal was filed on September 7, 1983 (App. E, *infra*, App. 21).

---

(footnote continued)

tend to commit proportionately more crimes" (S.J.C. Br. 44). Second, video game "arcades" (of which there are none in Marshfield) tend to increase noise, traffic, and congestion (*id.*). Third, video games are addictive to young people and cause them to spend money they cannot afford (*id.*). Fourth, businesses "which draw[] large numbers of unsupervised males" may adversely affect surrounding businesses (*id.* at 45). Fifth, because Marshfield is a summer resort community that attracts vacationing young people, automatic amusement devices could "increase the difficult youth behavior control problems already faced by police" (*id.*). None of these "facts" has any support in the agreed statement upon which the case was submitted to the Superior Court (*see* App. K, *infra*, App. 40-56), and the only such "fact" that has any support even in the Town's offer of proof is that persons may spend money which they cannot afford on video games (*see* S.J.C. App. 149-52).

## THE QUESTIONS ARE SUBSTANTIAL

This case presents fundamental constitutional questions concerning the authority of local governments to ban from commercial use a new, technologically advanced, and popular form of expressive entertainment. Because the judgment upholding General By-Law No. 48 is based upon the erroneous conclusion that video games are not a form of expression sufficiently consequential to warrant protection under the First and Fourteenth Amendments, and because banning video games, but not other forms of entertainment including some other automatic amusement devices, is neither substantially nor rationally related to any legitimate exercise of the police power, review by this Court is warranted.[7]

## I. THIS CASE INVOLVES SUBSTANTIAL QUESTIONS UNDER THE FIRST AMENDMENT.

1. The holding below, that video games are not entitled to First Amendment protection because " 'any communication or expression of ideas that occurs during the playing of a video game is purely inconsequential' " (App. A, *infra*, App. 8; quoting *Caswell* v. *Licensing Comm'n for Brockton*, 387 Mass. 864, 871 (1983)), is contrary to the central meaning of the First Amendment. First, this Court's prior cases clearly demonstrate, as the Court noted in *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981), that "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment,

---

[7] This Court recently granted plenary review to consider a similar, but more limited prohibition in *City of Mesquite* v. *Aladdin's Castle, Inc.*, 451 U.S. 981 (1981). *See City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), *rev'g in part and remanding* 630 F.2d 1029 (5th Cir. 1980).

such as musical and dramatic works, fall within the First Amendment guarantee." Likewise, it is well-established that novel forms of entertainment are no less entitled to protection than are the old, because "the basic principles of freedom of speech . . . do not vary." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952). *Accord Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558 (1975). Indeed, First Amendment protection has been afforded to every form of non-obscene entertainment that has been considered by this Court, regardless of the particular medium through which it is transmitted.[8]

Second, and as this Court's prior cases also demonstrate (*see* note 8, *supra*), questions of orthodoxy, taste and value have no greater place in determining the constitutional protection to be afforded nonobscene entertainment than they have in cases of political expression. As this Court acknowledged in *Winters* v. *New York*, 333 U.S. 507, 510 (1948), "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right. . . . What is one man's amusement, teaches another's doctrine." *Accord Joseph Burstyn, Inc.* v. *Wilson, supra*, 343 U.S. at 501. *See also Cohen* v. *California*, 403 U.S. 15, 24-26 (1971); *NAACP* v. *Button*, 371 U.S. 415, 444-45 (1963).

---

[8] *See, e.g., Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) (movies); *Jenkins* v. *Georgia*, 418 U.S. 153 (1974) (movies); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 208-211 (1975) (drive-in movie theaters showing films containing nudity and visible from public streets); *Southeastern Promotions, Ltd.* v. *Conrad, supra*, 420 U.S. at 557-58 (live theatrical performances containing group nudity and simulated sexual acts); *Schacht* v. *United States*, 398 U.S. 58, 62-63 (1970) (theatrical "skits" performed on public thoroughfares); *Schad* v. *Borough of Mount Ephraim, supra*, 452 U.S. at 62 (live nude dancing); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975) (live nude dancing); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) (human cannonball act).

The test employed by the Supreme Judicial Court—whether the expression of ideas is sufficiently "consequential" to warrant First Amendment protection—is simply too narrow and subjective a test to give proper scope to freedom of expression. Modern art, music and dance, to say nothing of such concededly protected activities as nude dancing, might well be prohibited under this test, which depends not upon constitutional principle, but upon the subjective value judgments of a reviewing court.

The impermissibly subjective nature of the test employed by the Supreme Judicial Court is well-demonstrated by its observation (App. A, *infra*, App. 8) "that in the future video games which contain sufficient communicative and expressive elements may be created." The First Amendment, however, makes no distinction between expression that is sophisticated and that which is not. *See, e.g., Cohen* v. *California, supra*, 403 U.S. at 24-26; *Winters* v. *New York, supra*, 333 U.S. at 510. Nor should the First Amendment afford any less protection to new, innovative, and emerging media than to more traditional modes of expression. *See, e.g., Joseph Burstyn, Inc.* v. *Wilson, supra*, 343 U.S. at 501-02. *See also Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 386-87 (1969).

It cannot seriously be disputed that video games are a technologically sophisticated medium through which an author's ideas and fantasies are expressed and communicated to the public. Indeed, the lower federal courts have so held in uniformly recognizing that video games, including some of the video games involved here, are protected by the Copyright Act, 17 U.S.C. §101 *et. seq.*, because they are "original works of authorship fixed in [a] tangible medium of expression . . . from which they can be . . . com-

municated" (17 U.S.C. §102(a)).[9] Only an unreasonably narrow construction of the First Amendment would deny constitutional protection to a medium which has been consistently recognized as protected under a statutory framework intended to protect "the literary, musical, graphic, or artistic form in which the author expressed intellectual concepts" (H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 56 (1976)).[10]

In many video games, the essential plot consists of a struggle between forces of good and evil, much like a morality play, a fable, a fairy tale or an animated cartoon. Contrary to the view expressed by the Supreme Judicial Court (App. A, *infra*, App. 8), an author's expression is no less worthy of constitutional protection merely because he has chosen to express his creative ideas and fantasies through the medium of a game, rather than an animated cartoon, book, poem, movie, television program, photograph,

---

[9] *See Midway Mfg. Co.* v. *Artic International, Inc.* 704 F.2d 1009 (7th Cir. 1983); *Williams Electronics, Inc.* v. *Artic International, Inc.*, 685 F.2d 870 (3d Cir. 1982); *Atari, Inc.* v. *North American Philips Consumer Electronics Corp.*, 672 F.2d 607 (7th Cir.), *cert. denied*, 103 S.Ct. 176 (1982); *Stern Electronics, Inc.* v. *Kaufman*, 669 F.2d 852 (2d Cir. 1982); *Midway Mfg. Co.* v. *Bandai-America, Inc.*, 546 F.Supp. 125 (D.N.J. 1982); *Midway Mfg. Co.* v. *Dirkschneider*, 543 F.Supp. 466 (D.Neb. 1981).

[10] In enacting the Copyright Act, Congress intended to maintain flexibility in its coverage because "[a]uthors are continually finding new ways of expressing themselves, [and] it is impossible to foresee the forms that these new expressive methods will take" (H.R.Rep. No. 94-1476, 94th Cong., 2d Sess. 51 (1976)). *See WGN Continental Broadcasting Co.* v. *United Video, Inc.*, 693 F.2d 622, 627-28 (7th Cir. 1982). Surely, as this Court's prior cases demonstrate, the First Amendment should be afforded no narrower a construction.

or painting.[11] Given the great popularity of video games, an author may well feel able to reach a wider audience through this medium, which has the additional advantage of actively engaging the audience in the performance of the author's script. Moreover, the coin-activated aspect of video games is as irrelevant here as it was in *Schad*, where this Court upheld the right of merchants to install coin-activiated mechanisms permitting customers to watch live nude dancing (*see* 452 U.S. at 62).

Like more traditional forms of entertainment, video games depict characters in action. Unlike more traditional and more passive forms of entertainment, however, video games require the active participation of the viewer. As a player in the game, the viewer assumes the role of one of the characters on the video screen, with the ability to control the action and change the outcome of the story, within the confines of the author's script and according to specific alternative outcomes that the author has created. In this respect, playing a video game is more akin to participating in improvisational theatre than to passively watching a play or movie.

Just as the First Amendment protects appellants' right to present video games to the public, it also protects the rights of those who seek to play these games or watch them being played.[12] Video game players, as they assume the

---

[11] *Cf. Kaplan* v. *California*, 413 U.S. 115, 119-20 (1973) ("pictures, films, paintings, drawings, and engravings," like oral utterances and the printed word, are entitled to First Amendment protection).

[12] The standing of appellants, as video game operators, to assert the constitutional rights of potential patrons is well-settled. *See Carey* v. *Population Services International*, 431 U.S. 678, 683-84 (1977); *Craig* v. *Boren*, 429 U.S. 190, 192-97 (1976); *Eisenstadt* v. *Baird*, 405 U.S. 438, 443-46 (1972).

roles of characters in the game, whose fates and fortunes they control, have a First Amendment right to act out ideas and fantasies through this interactive medium. *See, e.g., Schacht* v. *United States, supra,* 398 U.S. at 63. Indeed, even more so than traditional actors, video game players become co-authors of the stories presented on the screen, as they manipulate the characters and control the action. It is immaterial whether the program be long or short, the plot complex or unsophisticated. Whether the spotlight shines on a Broadway stage or a corner of a Marshfield general store is likewise immaterial.

Non-playing viewers have a similar constitutional right to benefit from exposure to the creative expression of those who play video games. Like viewers and listeners of other expressive media, video game viewers have a right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 390. *See also First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 783 (1978); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 756-57 (1976); *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969).

2. Because video games are a protected form of expression, and the ban created by General By-Law No. 48 is unsupported by any compelling justification, it violates the First Amendment. General By-Law No. 48 is not a time, place, and manner regulation (*see, e.g., Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976)), but a total prohibition against the commercial operation of video games anywhere within the Town of Marshfield. It is well-settled that such prohibitions of protected activity cannot survive constitutional scrutiny unless they are supported by a compelling governmental interest and narrowly drawn to minimize interference with First Amendment rights. *Schad* v. *Borough of Mount Ephraim,* 452

U.S. 61, 68-74 (1981); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *First National Bank of Boston* v. *Bellotti*, *supra*, 435 U.S. at 786; *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968); *Schneider* v. *State*, 308 U.S. 147, 161 (1939).[13]

General By-Law No. 48 falls far short of meeting these requirements. The Supreme Judicial Court could point to only two "possible purposes" for enacting the by-law: (a) decreasing noise, traffic, and congestion, and (b) avoiding unnecessary "concentration[s] of young people" (App. A, *infra*, App. 12). However, these hypothetical purposes cannot justify this absolute prohibition of protected activity. As the Supreme Judicial Court itself observed (App. A, *infra*, App. 12), the by-law could have been drawn much more narrowly to achieve these purposes, and the record is devoid of evidence to suggest that any "problems" that might be created by the presence of a few video games at scattered commercial locations could require this absolute ban.

The purported justifications embraced by the Supreme Judicial Court sound exceedingly hollow in view of the Town's willingness to permit a wide range of other commercial and recreational enterprises, including pool, billiards, bowling alleys, restaurants, taverns, live entertainments and public beaches, all of which presumably increase noise, traffic, and congestion, and several of which obviously result in "concentration[s] of young people." *See Schad* v. *Borough of Mount Ephraim*, *supra*, 452 U.S. at 72-75.

---

[13] The burden of showing that such an interest exists and that the restraint is properly tailored rests, of course, with the Town. *First National Bank of Boston* v. *Bellotti*, *supra*, 435 U.S. at 786; *see Elrod* v. *Burns*, 427 U.S. 347, 362 (1976); *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 262-63 (1974).

Moreover, at least one of the purported justifications identified by the Town and endorsed by the Supreme Judicial Court (*see* App. A, *infra*, App. 12) is itself constitutionally suspect. This Court has long recognized that the First Amendment protects the rights of individuals, regardless of sex or age, to go where they please and associate freely with whom they will, for social as well as political purposes, so long as they do so peaceably.[14] The purported justification for this ban—to prevent the association in one place of too many "single males under twenty-one years of age" (App. A, *infra*, App. 12)—is no justification at all. Where, as here, individuals seek to associate for the purpose of exercising their constitutional rights to express themselves and to observe the creative expression of others, they may be prevented from doing so only for some truly compelling reason, which clearly has not been shown here.[15]

Finally, General By-Law No. 48, both in its terms and as construed by the Massachusetts courts, is overbroad because it purports to ban other forms of expression that have already been held to be protected under the First Amendment. The Supreme Judicial Court expressly acknowledged that the by-law, on its face, bans coin-operated movie machines (App. A, *infra*, App. 10), a form of expressive entertainment functionally similar to video games

---

[14] *See, e.g., Gilmore* v. *City of Montgomery*, 417 U.S. 556, 575 (1974); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615 (1971); *NAACP* v. *Alabama*, 357 U.S. 449, 460-61 (1958). *See also Griswold* v. *Connecticut*, 381 U.S. 479, 483 (1965); *NAACP* v. *Button*, *supra*, 371 U.S. at 429-31.

[15] Indeed, it is noteworthy that the Town actually suggests that one of the purposes of General By-Law No. 48 is to prevent the congregation of single males, not only under the age of 21, but under the age of 25 (S.J.C. Br. 44).

and clearly entitled to full constitutional protection.[16] The broad definition in General By-Law No. 48 of the term "automatic amusement device," which the Massachusetts courts specifically declined to narrow (*see* App. A, *infra*, App. 8-10), sweeps within it other forms of expression as well, including the presence in commercial establishments of television sets, radios, stereo and phonograph equipment, and loudspeakers—indeed, almost every imaginable mechanical or electronic medium for broadcasting or displaying expressive entertainment.[17]

Whatever steps the Town of Marshfield legitimately might have taken to solve the problems which it perceives to exist as a result of the commercial operation of video games, the absolute ban created by General By-Law No. 48 cannot survive constitutional scrutiny because it cuts too deeply and too broadly into protected expression.

---

[16] *See Fantasy Book Shop, Inc.* v. *City of Boston*, 652 F.2d 1115, 1126 (1st Cir. 1981); *414 Theatre Corp.* v. *Murphy*, 360 F.Supp. 34, 36 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 1155 (2d Cir. 1974); *People* v. *Glaze*, 27 Cal.3d 841, 846, 614 P.2d 291, 294-95 (1980). *See also Schad* v. *Borough of Mount Ephraim*, *supra*, 452 U.S. at 65-66.

[17] Contrary to the conclusion of the Supreme Judicial Court (App. A, *infra*, App. 10), this acknowledged overbreadth may be raised by appellants because it is both real and substantial. *See Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). General By-Law No. 48 not only restrains the rights of appellants and their potential patrons, but also prohibits all expression through all non-exempt automatic amusement devices, subject to a fine of $200. This was precisely the situation in *Schad*, in which this Court held that "[b]ecause appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own" (452 U.S. at 66). *See also Grayned* v. *City of Rockford*, 408 U.S. 104, 114 (1972).

## II. THIS CASE INVOLVES SUBSTANTIAL QUESTIONS UNDER THE FOURTEENTH AMENDMENT.

1. General By-Law No. 48 distinguishes among three types of group or public amusement activities. First, the by-law absolutely prohibits the commercial operation of most automatic amusement devices, including video games. Second, the by-law expressly exempts from this ban the operation of certain automatic amusement devices, namely coin-operated jukeboxes, pool, billiards, bowling, and athletic training devices. Third, the by-law permits other group amusements and entertainments, including the Marshfield fair and public beaches, as well as restaurants and bars, many of which offer dancing and live entertainment to the public (*see* App. K, *infra*, App. 54-56). When the classifications created by General By-Law No. 48 are assessed against the purported purposes of the by-law, it is clear that the by-law violates the due process and equal protection clauses of the Fourteenth Amendment because it is unreasonable, arbitrary, and lacking in any "ground of difference having a fair and substantial relation to the object of the legislation." *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).

2. As this Court recently noted, even the undeniably broad power of local governments to control land use " 'must be exercised within constitutional limits.' " *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (*quoting Moore* v. *City of East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring)). Moreover, the "standard of review is determined by the nature of the right assertedly threatened or violated rather than the power being exercised or the specific limitation imposed." *Id.*

Since the classification created by General By-Law No. 48 directly impinges upon First Amendment freedoms (*see* pages 10-18, *supra*), the question properly to be addressed in the case at bar is whether that classification is

"precisely tailored to serve a compelling governmental interest." *Plyler* v. *Doe*, 457 U.S. 202, 217 (1982).[18] Even if this Court were to conclude that General By-Law No. 48 does not directly impinge upon First Amendment rights, however, it could not seriously be disputed that the by-law at least "gives rise to recurring constitutional difficulties" and may therefore be upheld only of it "may fairly be viewed as furthering a substantial [governmental] interest." *Plyler* v. *Doe, supra*, 457 U.S. at 217-18.[19] Finally, the equal protection clause requires in any event that a legislative classification be at least "rationally related to a legitimate governmental objective." *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 533 (1973).[20]

3. General By-Law No. 48 clearly violates the due process and equal protection clauses under any of these three tests. The Supreme Judicial Court was able to identify

---

[18] *See Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 99 (1972); *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969). *See also Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 256-62 (1974); *Dunn* v. *Blumstein*, 405 U.S. 330, 335-43 (1972).

[19] As we have shown (*see* pages 15, 17, *supra*), the right to present and have access to different forms of entertainment, and the right to associate for entertainment purposes are "basic in our constitutional scheme." *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 541 (1973) (Douglas, J., concurring). Where, as here, exercise of these rights is curtailed for some (*i.e.*, operators and players of video games and certain other automatic amusement devices), but not for others identically situated (*i.e.*, operators and players of certain other automatic amusement devices), the classification must be supported by some substantial justification. *See Plyler* v. *Doe*, *supra*, 457 U.S. at 223-24.

[20] *See also Eisenstadt* v. *Baird*, 405 U.S. 438, 446-447 (1972); *Reed* v. *Reed*, 404 U.S. 71, 75-76 (1971); *Railway Express Agency* v. *New York*, 336 U.S. 106 (1949).

only two possible purposes that might have led to the enactment of General By-Law No. 48: (a) to reduce noise, traffic, and congestion, and (b) to discourage males under the age of 21 from congregating (App. A, *infra*, App. 12). Neither of these purposes can justify the Town's decision to prohibit all but a few automatic amusement devices, while permitting other forms of group entertainment.

If the Town truly has sought to reduce noise, congestion, and traffic, General By-Law No. 48 is both underinclusive and arbitrary. The commercial operation of jukeboxes, pool tables, and bowling alleys—non-prohibited forms of entertainment indistinguishable from other "automatic amusement devices"—is at least as likely to cause traffic, noise, and congestion as are the prohibited devices.[21] Moreover, it is inconceivable that a few video games or other automatic amusement devices, operated in establishments principally devoted to other commercial activities, could cause parking, noise, or crowd control problems of a kind or magnitude more substantial than pool halls, bowling alleys, or establishments offering jukebox entertainment. If anything, those exempt activities are more likely to create such problems since they are primary, rather than accessory, uses. Nor can it seriously be contended that the impact of automatic amusement de-

---

[21] Several state courts have invalidated state laws that prohibited some automatic amusement devices, but not others, holding that such selective prohibitions are impermissibly arbitrary and violate the equal protection clause. *See, e.g., State* v. *Bloss*, 613 P.2d 354, 360-61 (Hawaii 1980); *Cossack* v. *City of Los Angeles*, 11 Cal.3d 726, 734-35, 523 P.2d 260, 265-66 (1974); *People* v. *Palazzolo*, 62 Mich.App. 140, 145-47, 233 N.W.2d 216, 219-20 (1975); *see also Looff* v. *City of Long Beach*, 153 Cal.App.2d 174, 181-85, 314 P.2d 518, 522-23 (1957).

vices on noise, traffic, and congestion is more substantial than that of restaurants, bars, or establishments offering live entertainment to the pubic. *Cf. Eisenstadt* v. *Baird, supra,* 405 U.S. at 451 (public health held an impermissible purpose for prohibiting sales of contraceptives to unmarried individuals because that purpose applies equally to married persons). Finally, the record contains no evidence whatever to suggest that video games (which have been operated in Marshfield for some 10 years) or any other prohibited amusement devices have ever caused any noise, traffic, or congestion problems in Marshfield.

The purported purpose of discouraging congregations of young males, quite apart from the serious constitutional questions which it raises (*see* page 17, *supra*), similarly fails to justify banning video games, but permitting jukeboxes, pool, billiards, bowling, and athletic training devices. General By-Law No. 48 does not purport to regulate assemblies of young people directly, and nothing suggests that young people do not and will not congregate in other places and for other purposes, regardless of any prohibition on the availability of video games or other nonexempt automatic amusement devices. The rationality of the Town's classification is therefore especially "dubious" (*see Griswold* v. *Connecticut,* 381 U.S. 479, 498 (1965) (Goldberg, J., concurring)) because the by-law itself exempts games and amusement devices that prompt the very same kinds of assemblies of young people seeking to entertain themselves. This is all the more obvious in view of the Supreme Judicial Court's acknowledgment that Marshfield, as a summer resort community, encourages a seasonal influx of young people (App. A, *infra,* App. 12). The general purpose of discouraging assemblies of young people simply cannot justify the different status accorded

similar activities. *See Eisenstadt* v. *Baird, supra,* 405 U.S. at 453. As Justice Jackson observed in his concurring opinion in *Railway Express Agency* v. *New York, supra,* 336 U.S. at 112-13:

> [N]othing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Whatever level of scrutiny may be appropriate in assessing the constitutionality of General By-Law No. 48, that by-law clearly violates the due process and equal protection clauses of the Fourteenth Amendment.

## CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

Ira H. Zaleznik
Barry E. Rosenthal
Valerie L. Pawson
Lewin & Rosenthal
63 Atlantic Avenue
Boston, Massachusetts 02110
(617) 227-9400

Jonathan T. Howe
Barry Sullivan*
Donald J. Rendall, Jr.
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

*Attorneys for Appellants*

Dated: September 26, 1983

*Counsel of Record

# APPENDIX

## APPENDIX A

Marshfield Family Skateland, Inc. & others[1]
vs. Town of Marshfield
(and five consolidated cases[2]).
Plymouth, February 10, 1983 — June 13, 1983
Present: Hennessey, C.J., Wilkins, Liacos, Abrams, & Lynch, JJ.

CIVIL ACTIONS commenced in the Superior Court Department on August 12, and August 16, September 1, and October 6, 1982.

The cases were consolidated for trial and were heard by *Ford, J.*

The Supreme Judicial Court granted a request for direct appellate review.

*Ira H. Zaleznik* (*Jarry E. Rosenthal* with him) for Marshfield Family Skateland, Inc. & others.

*Robert L. Marzelli,* Town Counsel, for the town of Marshfield.

HENNESSEY, C.J. This case involves the validity of a total prohibition by the town of Marshfield of the commercial operation of coin-activated amusement devices. In November, 1981, responding to a request for an opinion, town counsel for Marshfield advised the board of selectmen for Marshfield that the town zoning by law, adopted in 1972,

---

[1] The other plaintiffs are Thomas F. Vetra; Ocean Street Canteen, Inc.; John D. Gunn; Bonnie Parkers, Inc.; Venus II, Inc.; H. & M. Enterprises, Inc.; B.P. Productions, Inc.; Marshfield Sports Center, Inc. The plaintiffs are businesses and businessmen in the town of Marshfield.

[2] The cases were consolidated for trial with the case at bar; they were instituted by the building inspector of the town against the various plaintiff merchants named herein.

prohibited the commercial operation of coin-activated amusement devices in every zoning district of the town, as either a principal or accessory use. The board thereupon ceased issuing or renewing licenses for coin-activated amusement devices. This policy was adopted pending presentation at the 1982 annual town meeting of an amendment to the zoning by-law that would allow the operation of these devices in certain business zones, and a new by-law that would provide for licensing of the devices.

At the annual town meeting in June, 1982, however, the voters defeated the proposals and adopted instead an alternative amendment, General By-Law No. 48 (art. 57 of the town meeting warrant) expressly prohibiting the operation of "any mechanical or electronic amusement device, whether coin-operated or not," with certain exceptions.[3] General By-Law No. 48 was then submitted to the Attorney General for his approval pursuant to G. L. c. 40, § 32.

After passage of General By-Law No. 48, but before its approval by the Attorney General, the building inspector for the town of Marshfield commenced enforcement of the zoning by-law adopted in 1972, by sending violation notices to all persons operating coin-operated amusement devices, ordering them to cease such use of their property. The plaintiff merchants refused to cease operating the amusement devices and in August, 1982, the building inspector instituted court proceedings against them.

---

[3] General By-Law No. 48, provides as follows: "1. No person shall keep or cause to be kept, operate or suffer to be operated, on premises owned or leased by him, or subject to his control, any mechanical or electronic automatic amusement device, whether coin-operated or not (as defined under, but not limited to, Chapter 140, Section 177A(2) of the Massachusetts General Laws) except private in-home use, coin-operated juke boxes, pool, billiard, bowling and athletic training devices. 2. Any person found violating the provisions of this bylaw will be punished by a fine of $200 for each offense."

On September 30, 1982, the Attorney General approved General By-Law No. 48. The plaintiff merchants then commenced this action in Superior Court seeking a declaration that General By-Law No. 48 is invalid. They also applied for a preliminary injunction against the town to prevent it from enforcing General By-Law No. 48. After a hearing, the trial judge denied injunctive relief to the plaintiffs and they, then, filed a petition for relief with a single justice of the Appeals Court under G. L. c. 231 § 118. The town agreed not to undertake any enforcement proceedings pending the single justice's decision and the single justice ordered the parties to seek a speedy hearing in the Superior Court.[4]

In order to expedite proceedings in the Superior Court, the parties presented a statement of agreed facts. Also by agreement, the merchants developed and submitted a videotape demonstration of parts of the audio visual work of five different video games, along with a written explanation of the videotape. The Superior Court judge held a hearing on these matters. Subsequently, he issued memorandum of decision applicable to all six cases in which he declined to invalidate the Marshfield by-law. Judgments were entered in all the cases. The merchants then filed their notices of appeal to the Appeals Court, and all actions were consolidated on appeal by order of a single justice of that court. We granted the plaintiffs' application for direct appellate review.

On appeal the merchants attack the validity of both General By-Law No. 48 and the provisions of the zoning by-law adopted in 1972. With regard to General By-Law

[4] The town's stipulation not to enforce both by-laws was superseded by the single justice's subsequent allowance of the merchants' request for stays and injunctive relief pending appeal. Thus, the merchants have been able to continue operation of their amusement devices during the pendency of these proceedings.

No. 48, they contend that the total prohibition of coin-operated amusement devices is invalid because it (1) is inconsistent with State law, (2) violates fundamental rights of free expression guaranteed under the First Amendment to the United States Constitution, and arts. 16 and 19 of the Massachusetts Declaration of Rights, and (3) denies the merchants due process and equal protection of the laws under both the State and Federal Constitutions. With regard to the zoning by-law adopted in 1972, the merchants argue that the by-law, properly interpreted, does not prohibit the operation of coin-activated amusement devices either as part of the merchants' principal uses or as accessory uses. They further contend that, if the 1972 zoning by-law is interpreted to preclude operation of coin-operated amusement devices, the by-law is invalid for the same reasons that General By-Law No. 48 is invalid. We conclude that General By-Law No. 48 is a proper exercise of the town of Marshfield's police power and we reject all the merchants' arguments as to its invalidity. Since we uphold the express prohibition of coin-activated amusement devices under General By-Law No. 48, we need not address the issues raised with regard to the more general provisions of the 1972 zoning by-law.

1. The merchants' first contention is that General By-Law No. 48 is invalid because it is inconsistent with State law. They assert initially that where, as here, a by-law results in a total ban of a particular activity, we should shift the burden of justifying the exclusion to the municipality. See e.g., *Beaver Gasoline Co.* v. *Osborn Borough,* 445 Pa. 571, 576-577 (1971). We do not follow this so called "Pennsylvania rule," see *Lambros, Inc.* v. *Ocean Ridge,* 302 So.2d 993, 994 (Fla. App. 1981), but rather we adhere to the view that every presumption will be made in favor of the validity of a by-law or ordinance. See, e.g., *Shell Oil Co.* v. *Revere,* Mass. Adv. Sh. (1981) 1285, 1289 (con-

sidering a city ordinance banning self-service gasoline stations); *John Donnelly & Sons* v. *Outdoor Advertising Bd.*, 369 Mass. 206, 216 (1975) (considering by-law in effect prohibiting billboards even in business districts).

Applying this standard of review, we examine the validity of General By-Law No. 48. Under § 6 of art. 89, the Home Rule Amendment, and § 13 of G. L. c. 43B, the Home Rule Procedures Act, communities may enact legislation to advance the common good so long as it is not inconsistent with State law. See *Bloom* v. *Worcester*, 363 Mass. 136, 145, 149 (1973). In *Bloom*, we resolved that in determining whether a local ordinance or by-law is "not inconsistent" with any general law for purposes of the Home Rule provisions, we would follow "the same process of ascertaining legislative intent . . . as has been performed in the Federal preemption cases and in our own cases involving 'inconsistent' or 'repugnant' local ordinances or by-laws." *Id.* at 155. Under this approach, we emphasized, "[t]he legislative intent to preclude local action must be clear" (footnote omitted). *Id.* We noted that there where State laws on a particular subject are comprehensive or where the Legislature has explicitly limited the manner in which cities and towns may act on a subject, a locality's right to act on that subject may be preempted. *Id.* A local by-law may also be deemed inconsistent where it prevents a legislative purpose from being achieved. *Id.*

In this case, the merchants urge that the local by-law's prohibition of the keeping and use of coin-activated, mechanical, and electronic amusement devices conflicts with G. L. c. 140, § 177A, the statutory provision which allows municipalities to license "automatic amusement device[s]" as defined in that section. Under General By-Law No. 48 a "mechanical or electronic automatic amusement device" is defined as including but not limited to the devices

defined under G. L. c. 140, § 177A. The merchants claim that the by-law is inconsistent with G.L. c. 140, § 177A, because it prevents the achievement of the legislative purpose behind G. L. c. 140, § 177A. We disagree. Prior to the enactment of § 177A, we held in *Commonwealth* v. *Rivers,* 323 Mass. 379, 383, (1948), that "free play" pinball machines and similar devices were illegal lotteries under G. L. c. 271, § 7. Section 177A was enacted shortly after our decision in *Rivers* "for the purpose of permitting the use and maintenance of automatic amusement devices such as pinball machines, including 'free play' pinball machines, if duly licensed and if used for amusement only." *Commonwealth* v. *Macomber,* 333 Mass. 298, 301 (1955). Thus, one purpose of § 177A was clearly to remove coin-activated amusement devices from the ambit of the gambling laws and to *allow* localities to license these games. General By-Law No. 48 does not prevent this purpose from being achieved.

The merchants contend, however, that in enacting § 177A, the Legislature did not intend to allow local communities to ban all automatic amusement devices. They rely heavily on our decision in *Turnpike Amusement Park, Inc.* v. *Licensing Comm'n of Cambridge,* 343 Mass. 435, 438 (1962), where we determined that G. L. c. 140, § 177A, does not give local licensing authorities the power to impose an over-all ban on automatic amusement devices. Our reasoning in *Turnpike Amusement Park, Inc.,* however, is not controlling in the case at bar. The power of a local licensing board to issue licenses under G. L. c. 140, § 177A, is created and defined entirely by the provisions of G. L. c. 140, § 177A. Hence, a licensing board, although it may exercise its broad grant of discretion under the statute to grant or to deny licenses, may not go beyond that statutory grant and adopt a broad policy of denying all licenses. In contrast, local communities, through their by-laws, may sup-

plement the statutory provisions so long as their by-laws are not inconsistent with any State law. See *John Donnelly & Sons, supra* at 214, and cases cited. Hence, the town of Marshfield may do what the licensing board may not do—namely, determine that it will not allow any licenses to be issued. It is clear that in some areas of activity legal business activities regulated by State law may be prohibited by local by-laws. *John Donnelly & Sons, supra* at 214, 222. Section 177A does not reveal any intent by the Legislature to vary this rule. Rather, § 177A reveals only the Legislature's intent to convert the operation of "free play" coin-activated amusement devices from the status of illegal lotteries under the *Rivers* decision to that of legal, regulated activities permitted but not required to operate in a community.

2. The merchants next submit that General By-Law No. 48 is unconstitutional because it infringes on fundamental rights of freedom of expression guaranteed under both the State and Federal Constitutions. They contend that the by-law is facially invalid because it suppresses both video game entertainment, which they seek to present to the public and which they claim is protected expression, as well as other forms of protected expression. We first address the merchants' contention with regard to video game entertainment.

In *Caswell* v. *Licensing Comm'n for Brockton,* 387 Mass. 846, 867-871 (1983), we confronted a similar claim by the plaintiff Caswell that video game entertainment is a form of expression entitled to constitutional protection. We explained that, although entertainment may be entitled to First Amendment protection, "to gain protected status, that entertainment must be designed to communicate or express some idea or some information." *Id.* at 868. On the record before us in *Caswell,* we concluded that Caswell

had not demonstrated successfully that video games import sufficient communicative, expressive, or informative elements to constitute protected expression under either the State or Federal Constitution. We stated: "From the record before us, it appears that any communication or expression of ideas that occurs during the playing of a video game is purely inconsequential. Caswell has succeeded in establishing only that video games are more technologically advanced games than pinball or chess. That technological advancement alone, however, does not impart First Amendment status to what is otherwise an unprotected game." *Id.* at 871. We adhere to our reasoning and holding in *Caswell* in the case at bar. The merchants in this case, in an attempt to demonstrate that video games contain sufficient communicative elements to be entitled to constitutional protection, prepared a videotape demonstration of parts of the audio visual work of five different video games,[5] together with a written explanation of the videotape. The videotape and explanation, however, do not demonstrate any more communicative aspects of these video games than were demonstrated by the plaintiff in *Caswell*. We recognize that in the future video games which contain sufficient communicative and expressive elements may be created. We are not prepared in this case, however, to hold that these video games, which are, in essence, only technologically advanced pinball machines, are entitled to constitutional protection.

The merchants further submit that even if the video game entertainment which they seek to present is not protected expression, General By-Law No. 48 is, nevertheless, void under the overbreadth doctrine because it prohibits many forms of expression. They argue, that on its face,

---

[5] The five different video games were: "Ms. Pac-Man," "Tron," "Donkey Kong," "Zaxxon," and "Kangaroo."

the Marshfield by-law would prohibit the operation of coin-activated movie machines, i.e., peep shows, which "are fully protected by the First Amendment." *Fantasy Book Shop, Inc.* v. *Boston*, 652 F.2d 1115, 1124 n.12 (1st Cir. 1981). The merchants, thus, contend that we should invalidate Marshfield's General By-Law No. 48.

We conclude, however, that the merchants may not rely upon the doctrine of overbreadth in this case. In *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973), the Court acknowledged that the general rule is that a person to whom a statute may be applied constitutionally will not be allowed to challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. The Court explained that since "the First Amendment needs breathing space . . . [l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 611-612. The Court admonished, however, that because the overbreadth standing doctrine is "manifestly, strong medicine," the Court has employed it sparingly. *Id.* at 613. In *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976), quoting *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975), the Court further explained that, if a statute's deterrent effect on protected expression is not "both real and substantial" and if the statute is "readily subject to a narrowing construction," the doctrine of overbreadth may not be employed.

In this case, the merchants have not demonstrated either substantial overbreadth, or substantial deterrent effect. Their only possible claim of deterrence is that persons desiring to engage in the operation of coin-activated movies in Marshfield may refrain from doing so out of fear that the Marshfield by-law might be applied to prohibit their

actions. The merchants, however, have shown that the by-law would bar only one form of protected expression — coin-activated movies. This potential prohibition of one form of entertainment is not substantial overbreadth. Contrast *Shad* v. *Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981) (ordinance prohibited all forms of live entertainment). Moreover, it appears unlikely that potential operators of coin-activated movies would be chilled from applying for a license because of the existence of General By-Law No. 48. Rather, they would probably be as willing to apply for a license as are the merchants in this case and, if denied a license on the basis of the by-law, to litigate its constitutionality. For these reasons, we conclude that the merchants may not rely on the overbreadth doctrine to invalidate a by-law which may be applied constitutionally to their own activities. See *Young, supra* at 60-61; *Broadrick, supra* at 615-618; *Aristocratic Restaurant of Massachusetts, Inc.* v. *Alcoholic Beverages Control Comm'n (No. 1)*, 374 Mass. 547, 555-557, appeal dismissed, 439 U.S. 803 (1978).

3. The merchants' final contention is that the Marshfield by-law violates the due process and equal protection guarantees of both the State and Federal Constitutions. We note that "the right . . . to pursue one's business" has never been considered to be a fundamental right warranting strict judicial scrutiny. *Commonwealth* v. *Henry's Drywall Co.*, 366 Mass. 539, 542 (1974), and cases cited. We also emphasize that, as we have determined, this case does not involve protected rights of freedom of expression. Accordingly, since no fundamental rights are involved, the validity of the Marshfield by-law must be judged by the lowest level of scrutiny, the rational basis test. See *Orleans* v. *Dukes*, 427, U.S. 297, 303 (1976); *Zayre Corp.* v. *Attorney Gen.*, 372 Mass. 423, 433 (1977). Under the rational basis test, "the person making the challenge has an onerous burden of proof in establishing the inval-

idity of the statute." *Commonwealth* v. *Henry's Drywall Co., supra* at 541. In applying the rational basis standard, we have stated that "[i]f a statute or ordinance serves a legitimate purpose, and if the means of the State adopted are rationally related to the achievement of that purpose, the legislation will withstand constitutional challenge" (footnote omitted). *Shell Oil Co.* v. *Revere,* Mass. Adv. Sh. (1981) 1285, 1289. We have further explained that "a statutory classification will not be set aside as a denial of equal protection or due process if any state of facts reasonably may be conceived to justify it." *Henry's Drywall Co., supra.* The plaintiffs claim that the Marshfield by-law violates their rights to due process and equal protection because it is not rationally related to permissible legislative objectives and because the singling out of commercially operated amusement devices is an irrational classification. We disagree.

With regard to the plaintiffs' due process challenge, we conclude that the by-law does bear a "reasonable relation to a permissible objective of the police power." *John Donnelly & Sons* v. *Outdoor Advertising Bd.,* 369 Mass. 206, 216 (1975). The right to pursue trade or business "is not unqualified and, in certain circumstances, must yield to regulations designed to promote the public safety, health, morals and general welfare. Our function is to ensure that no regulation unreasonably interferes with the pursuit of a trade or business. It is not our function to consider the expediency of an enactment on the wisdom of its provisions" (citations omitted). *Henry's Drywall Co., supra* at 544. In this case, Marshfield has chosen to prohibit completely the commercial operation of coin-operated amusement devices rather than to regulate certain aspects of their operation. It is well established that "even a legitimate occupation may be restricted or prohibited in the public interest." *Breard* v. *Alexandria,* 341 U.S. 622, 632-

633 (1951). *John Donnelly & Sons, supra* at 222. The issue is whether there is a rational basis for the prohibition. *Breard, supra.* A town's possible purposes in adopting an ordinance like the instant one may include a number of permissible objectives. For example, it would be reasonable for a town to prohibit the commercial operation of these games to further the legitimate objectives of decreasing noise, traffic, and congestion in the area of the business operating the games. Indeed, the record submitted in this case demonstrates that the operation of these games contributes to such problems. From the offer of proof of Marshfield and an affidavit of a retired police officer of Marshfield, it appears that Marshfield is a resort community located on the coast; that a substantial proportion of the influx of summer residents to Marshfield each year are single males under twenty-one years of age; that the Marshfield police department has to increase police patrols in the beach areas during the summer season to maintain order; that any business which causes concentration of young people, particularly in the beach areas in the summer, increases the potential for disorderly conduct as well as the burden on the police department; and that automatic amusement devices do attract as patrons large numbers of young people. Although the by-law in this case might have been drawn more narrowly, for example, to prohibit the operation of these games during only the summer season, we emphasize that "[a] statute or ordinance is not rendered unconstitutional merely because the evidence of record suggests that the 'ultimate efficacy' of achieving the statutory purpose is in question, or that the means to achieve the statutory end is rough, illogical or not the best available, or that the means stated in the statutes is not perfectly consistent with the desired result" (footnotes omitted). *Shell Oil Co., supra* at 1290. "[L]egislative bodies 'are not required to convince the courts of the cor-

rectness of their legislative judgments.'" *Shell Oil Co., supra at* 1291-1292, quoting *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

The merchants' equal protection argument also fails under the rational basis test. The equal protection guarantee requires us to examine whether the classification chosen by the town of Marshfield rationally furthers a legitimate State interest. *Shell Oil Co., supra* at 1293. The merchants urge that the by-law is invalid because, even if Marshfield has a legitimate interest to regulate, the classification, nevertheless, is improper because the State's interest in regulating commercially operated automatic amusement devices is no different from the State's interest in regulating billiards, bowling, home video games, juke boxes, golf, baseball, and other forms of recreation and amusement. We conclude, however, that it was for the town to determine whether commercially-operated automatic amusement devices pose any greater or different threats to the safety and order of its community than do these other forms of amusement. "Once the Legislature has drawn a classification, 'neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.'" *Shell Oil Co., supra* at 1291, quoting *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 154 (1938).[6] The rationale for this respect for legislative deci-

---

[6] The merchants rely on several cases from other jurisdictions where courts invalidated certain bans on the playing of pinball machines on the ground that the bans violated the equal protection clause. *Cossack* v. *Los Angeles*, 11 Cal.3d 726, 734-735 (1974). *State* v. *Bloss*, 613 P.2d 354 (Hawaii 1980). *People* v. *Palazzolo*, 62 Mich. App. 140, 146-147 (1975). We point out, however, that in *Cossack* and *Bloss*, the courts considered prohibitions by municipalities of some coin-operated amusement games and not others and, therefore, the reasoning of those courts is inapposite. Furthermore, we decline to follow the reasoning of the court in *Palazzolo*.

sion making is borne out by the fact that the court in no instance could possibly have before it all of the knowledge and considerations which might have impelled those who voted for the by-law, particularly as that knowledge bore on the legitimate concerns related to the police power. On the record before us, we conclude that the basis for the classification is not "more fanciful than real." *Coffee-Rich, Inc.* v. *Commissioner of Pub. Health*, 348 Mass. 414, 425 (1965). Nor do we conclude that the classification is arbitrary or irrational. *See Henry's Drywall Co., supra* at 545. Therefore, we do not invalidate it. Accordingly, we reject the merchants' arguments based on both equal protection and due process, and we uphold the validity of General By-Law No. 48.

*Judgments affirmed.*

## APPENDIX B

186

COMMONWEALTH OF MASSACHUSETTS
Plymouth, ss.

Superior Court Department
Of The Trial Court
Ford, J.
November 8, 1982

George Dobson vs. John D. Gunn
CA82-15,569

George Dobson vs. Thomas F. Vetra
CA82-15,593

George Dobson vs. Ocean Street Canteen, Inc.
CA82-15,596

George Dobson vs. G. P. Productions, Inc., d/b/a
CA82-15,597

George Dobson vs. Bonnie Parkers, Inc., et als.
CA82-15,685

Marshfield Family Skateland, Inc., et als.
vs. Town of Marshfield
CA82-15,864

### MEMORANDUM OF DECISION RULINGS AND ORDERS FOR JUDGMENT

1. In 15,864, plaintiffs Marshfield Family Skateland, Inc., et al., (Merchants) in the Town of Marshfield (Town) seek injunctive and declaratory relief with respect to the barring of video games and like coin-activated amusement games. Such barring results from Article 57, adopted by the Town on June 15, 1982 and approved by the Attorney General on September 30, 1982. The parties refer to this Article as General By-Law 48.

2. Consolidated for trial are the other five actions brought by the Town's Building Inspector, George Dobson (Dobson) against various merchants (Merchants) to enjoin the operation of coin-activated amusement games, including video games, on their premises. It is alleged this is not an accessory use, but is a prohibited use under the Town's Zoning By-Law. The record consists of an agreed statement of facts.

3. The Court has declined to hear testimony offered by all parties as to the desirability, or each lack of desirability, of the Article and By-Law in question, *Comm.* v. *Reis,* 355 Mass. 189 (1969).

4. Accordingly, it is unnecessary for the Court to make findings of fact. No facts are in dispute.

5. Coin-operated amusement machines have had a troubled history in the nation and in this Commonwealth. They are closely regulated for obviously public policy reasons. Their control has spawned a welter of litigation everywhere.

6. The decided cases are in disarray as to the power of the public to control these devices. See, for example, *Turnpike Amusement Park, Inc.* v. *Cambridge,* 343 Mass. 435 (1962) (decided *before* the Home Rule Amendment) where the Court declared invalid the barring of all pinball machines. Compare with the recent Federal case of *Rothner* v. *City of Des Plaines,* U.S.D.C. (DC No Dist. Ill.) No. 81C2669 Slip Opinion Sept. 11, 1981 upholding a "Home Rule" barring of electronic games.

7. The Home Rule Amendment (Mass. Const. Amendment L XXXIX (Mass. Annot. Laws, Sec. 235, p. 521) was adopted in 1966. It, inter alia, empowers a Town to enact a broad range of local laws (see sec. 6 & 7). A Town can, with certain qualifications,

> ". . . . adopt by-laws . . . (and) exercise any power or function which the general court has power to confer on it . . . . which (are) not inconsistent with . . . laws enacted by the general court . . . ."

8. I rule the Zoning By-Law is valid. I rule that the use of these games is not an accessory use as set forth in the Zoning By-Law. The Town shall prevail in the zoning cases. I rule all issues raised in the counter-claims are resolved in favor of the Town and against Merchants.

9. The Inhabitants of the Town of Marshfield, after due deliberation, enacted Article 57, the video game by-law, barring such games. They perceived, as a public policy matter, that the interdicted games were inimical to the public good and the public order.

10. While the matter is not free from doubt, the court is not persuaded that the video game by-law is unconstitutional or in excess of the powers granted to the Town by the Home Rule Amendment or by the General Court. It is noted that Attorney General Bellotti, after careful review, reached the same conclusion and approved the by-law in issue.

11. Moreover, the more usual and appropriate procedure is to raise these issues in the normal course of criminal trials in which these, the Merchants, may become defendants.

12. Moreover, and in any event, the Court chooses to follow the normal judicial policy, absent compelling reasons not present here, to be slow to declare unconstitutional the acts of other branches of government. Trial courts traditionally defer to appellate courts in these matters. The Appeals Court, or the Supreme Judicial Court, as the case may be, can resolve these issues after extensive briefings, hearings, reflection and deliberation. This will guarantee due and proper regard for the doctrine of separation of powers of our state government.

13. I rule Article 57 is valid.

14. Dobson and the Town are to have judgment in their favor. The Merchants are to have judgments against them on their counterclaims.

ORDERS FOR JUDGMENT

15. Judgment are to be entered in accordance with the foregoing.

*/s/ Joseph Ford*
JOSEPH FORD
Justice of The Superior Court

Entered: November 8, 1982

## APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court for the Commonwealth,

At Boston, June 13, 1983.

In the case No. SJC-3043

MARSHFIELD FAMILY SKATELAND, INC. & others

vs.

TOWN OF MARSHFIELD
(and five consolidated cases)

pending in the Superior Court Department of the Trial Court for the County of Plymouth No. 82-15864, 82-15596, 82-15597, 82-15593, 82-15685, 82-15569

ORDERED, that the following entry be made in the docket; viz.,—Judgments affirmed.

By the Court,
Patrick J. Hurley, Clerk.

June 13, 1983

See opinion on file.

**APPENDIX D**

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
Room 412 Court House
Boston, Massachusetts, 02108
(617) 725-8055

Patrick J. Hurley
Clerk.

Fredrick J. Quinlan
Assistant Clerk

June 29, 1983

Ira H. Zaleznik, Esquire
Lewin & Rosenthal
63 Atlantic Avenue
Boston, MA 02110

Dear Attorney Zaleznik:

RE: MARSHFIELD FAMILY SKATELAND, INC. & others vs. TOWN OF MARSHFIELD
(and five consolidated cases)
No. SJC-3043
Petition for Rehearing No. 333

Your Petition For Rehearing has been considered by the Court and is denied.

The Court has continued in effect, copy enclosed, the Appeals Court order enjoining the town and its officers from enforcing the provisions of General By-Law No. 48 pending appeal, until further order of the Supreme Judicial Court. It is the responsibility of counsel to inform this Court of the action taken by the Circuit Justice on the plaintiffs' request for a stay and injunction pending appeal to the United States Supreme Court.

The rescript will not issue to the Superior Court until further order of this Court.

Very truly yours,
PATRICK J. HURLEY, Clerk

cc: Robert L. Marzelli, Esquire
Billingham & Marzelli
95 Church Street
Pembroke, MA 02358

**APPENDIX E**

SUPREME JUDICIAL COURT
FOR THE
COMMONWEALTH OF MASSACHUSETTS

MARSHFIELD FAMILY SKATELAND, INC., ET AL.,
Plaintiffs-Appellants,
vs.
TOWN OF MARSHFIELD,
Defendant-Appellee,
(And Five Consolidated Cases).

No. SJC-3043

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Marshfield Family Skateland, Inc., Thomas F. Vetra, Ocean Street Canteen, Inc., Bonnie Parkers, Inc., Venus II, Inc., H & M Enterprises, Inc., BP Productions, Inc., and Marshfield Sports Center, Inc. the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in this action on June 13, 1983.

This Appeal is taken pursuant to 28 U.S.C. §1257 (2).

By its Attorneys,
LEWIN & ROSENTHAL
By: *Valerie L. Pawson*
Ira H. Zaleznik
Valerie L. Pawson
63 Atlantic Avenue
Boston, MA 02110
(617) 227-9400

Received
L. H. White
Sep 7 1983

## APPENDIX F

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court Department
of the Trial Court
Civil Action
No. 82-15864
Ford, J.
11-8-82

MARSHFIELD FAMILY SKATELAND, INC.
ET ALS.
Plaintiffs,

vs.

TOWN OF MARSHFIELD,
Defendant

JUDGMENT

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

1. Article 57 adopted June 15, 1982 by the Town of Marshfield, (and now known as General By-Law No. 48), and approved by the Attorney General on September 30, 1982, is a valid exercise of the power granted to the Town under the Home Rule Amendment to the Constitution of the Commonwealth of Massachusetts.

2. Article 57 is not in conflict with any statute of the Commonwealth of Massachusetts.

3. Article 57 does not violate any right to free speech, due process of law, and equal protection of the laws as guaranteed by the First and Fourteenth Amendment to the Constitution of the United States and Articles I, VI,

X, XII, and XIX of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts.

4. Article 57 does not violate any provision of the Constitution of the United States.

5. Article 57 does not violate any provision of the Constitution of the Commonwealth of Massachusetts.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
Civil Action
No. 15,596
Ford, J.
11/8/82

GEORGE DOBSON
Plaintiff

vs.

OCEAN STREET CANTEEN, INC.
Defendant

JUDGMENT

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

The defendant Ocean Street Canteen, Inc. is ordered to cease and desist forthwith from operating coin-activated amusement devices on the premises at Marshfield Plaza East in the Town of Marshfield.

By the Court
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
Civil Action
No. 15,596
Ford, J.
11/8/82

GEORGE DOBSON,
Plaintiff
vs.
OCEAN STREET CANTEEN, INC.
Defendant

JUDGMENT ON COUNTER-CLAIM

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

1. The Marshfield Zoning Bylaw is a valid exercise of the power granted to the Town under the Zoning Enabling Act and the Home Rule Amendment to the Constitution of the Commonwealth of Massachusetts.

2. The Zoning Bylaw is not in conflict with any statute, of the Commonwealth of Massachusetts.

3. The Zoning Bylaw prohibits the operation of coin-activated amusement games as an accessory use.

4. The Zoning Bylaw does not violate any provision of the Constitution of the United States.

5. The Zoning Bylaw does not violate any provision of the Constitution of Massachusetts.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
Civil Action
No. 15,597
Ford, J.
11/8/82

GEORGE DOBSON
Plaintiff

vs.

G. P. PRODUCTIONS, INC. d/b/a
Defendant

JUDGMENT

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

The defendant G. P. Productions, Inc. d/b/a The Road House, is ordered to cease and desist forthwith from operating coin-activated amusement devices on the premises at 1140 Ocean Street in the Town of Marshfield.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
Civil Action
No. 15,596
Ford, J.
11/8/82

GEORGE DOBSON
Plaintiff
vs.
G. P. PRODUCTIONS, INC. d/b/a
Defendant

JUDGMENT ON COUNTER-CLAIM

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows

1. The Marshfield Zoning Bylaw is a valid exercise of the power granted to the Town under the Zoning Enabling Act and the Home Rule Amendment to the Constitution of the Commonwealth of Massachusetts.

2. The Zoning Bylaw is not in conflict with any statute, of the Commonwealth of Massachusetts.

3. The Zoning Bylaw prohibits the operation of coin-activated amusement games as an accessory use.

4. The Zoning Bylaw does not violate any provision of the Constitution of the United States.

5. The Zoning Bylaw does not violate any provision of the Constitution of Massachusetts.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
Civil Action
No. 15,593
Ford, J.
11/8/82

GEORGE DOBSON
Plaintiff

vs.

THOMAS F. VETRA
Defendant

JUDGMENT

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

The defendant Thomas F. Vetra is ordered to cease and desist forthwith from operating coin-activated amusement devices on the premises at 507 Ocean Street in the Town of Marshfield.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
Civil Action
No. 15,593
Ford, J.
11/8/82

GEORGE DOBSON
Plaintiff
vs.
THOMAS F. VETRA
Defendant

JUDGMENT ON COUNTER-CLAIM

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

1. The Marshfield Zoning Bylaw is a valid exercise of the power granted to the Town under the Zoning Enabling Act and the Home Rule Amendment to the Constitution of the Commonwealth of Massachusetts.

2. The Zoning Bylaw is not in conflict with any statute, of the Commonwealth of Massachusetts.

3. The Zoning Bylaw prohibits the operation of coin-activated amusement games as an accessory use.

4. The Zoning Bylaw does not violate any provision of the Constitution of the United States.

5. The Zoning Bylaw does not violate any provision of the Constitution of Massachusetts.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
Civil Action
No. 15,685
Ford, J.
11/8/82

GEORGE DOBSON
Plaintiff

vs.

BONNIE PARKERS, INC., et als.,
Defendants

JUDGMENT

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

The defendants Bonnie Parkers, Inc., Venus II, Inc. and H. and M. Enterprises, Inc., and each of them, are ordered to cease and desist forthwith from operating coin-activated amusement devices on their premises at Marshfield Plaza East in the Town of Marshfield.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
Civil Action
No. 15,685
Ford, J.
11/8/82

GEORGE DOBSON
Plaintiff
vs.
BONNIE PARKERS, INC., et als.
Defendants

JUDGMENT ON COUNTER-CLAIM

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

1. The Marshfield Zoning Bylaw is a valid exercise of the power granted to the Town under the Zoning Enabling Act and the Home Rule Amendment to the Constitution of the Commonwealth of Massachusetts.

2. The Zoning Bylaw is not in conflict with any statute, of the Commonwealth of Massachusetts.

3. The Zoning Bylaw prohibits the operation of coin-activated amusement games as an accessory use.

4. The Zoning Bylaw does not violate any provision of the Constitution of the United States.

5. The Zoning Bylaw does not violate any provision of the Constitution of Massachusetts.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

## APPENDIX G

Filed in Superior Court for the County of Plymouth

November 8, 1982

Francis R. Powers, Clerk

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
Department of the
Trial Court
C.A. No. 82-15864

MARSHFIELD FAMILY
SKATELAND, INC., et als.
Plaintiffs

vs.

TOWN OF MARSHFIELD,
Defendant

### NOTICE OF APPEAL

Plaintiffs Marshfield Family Skateland, Inc., et als., hereby appeal to the Appeals Court from the final judgment entered in this action on November 8, 1982.

By their attorneys,
LAPPIN, ROSEN, GOLDBERG,
SLAVET, LEVENSON & WEKSTEIN

By IRA H. ZALEZNIK
One Boston Place
Boston, MA 02108
Tel: 437-1000

Filed in Superior Court for the County of Plymouth
November 8, 1982
Francis R. Powers, Clerk

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
No. 82-15596

GEORGE DOBSON, as he is
Inspector of Buildings of
Marshfield
Plaintiff

vs.

OCEAN STREET CANTEEN, INC.
Defendant

NOTICE OF APPEAL

Defendant hereby appeals to the Appeals Court from the final judgment entered in this action on November 8, 1982.

Respectfully submitted,

LAPPIN, ROSEN, GOLDBERG,
SLAVET, LEVENSON & WEKSTEIN

By IRA H. ZALEZNIK
One Boston Place
Boston, MA 02108
Tel: 437-1000

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
No. 82-15597

GEORGE DOBSON, as he is
Inspector of Buildings of
Marshfield
Plaintiff

vs.

G. P. PRODUCTIONS, INC.
Defendant

NOTICE OF APPEAL

Defendant hereby appeals to the Appeals Court from the final judgment entered in this action on November 8, 1982.

Respectfully submitted,

LAPPIN, ROSEN, GOLDBERG,
SLAVET, LEVENSON & WEKSTEIN

By IRA H. ZALEZNIK
One Boston Place
Boston, MA 02108
Tel: 437-1000

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss. Superior Court
No. 82-15593

GEORGE DOBSON, as he is
Inspector of Buildings of
Marshfield
Plaintiff

vs.

THOMAS F. VETRA
Defendant

NOTICE OF APPEAL

Defendant hereby appeals to the Appeals Court from the final judgment entered in this action on November 8, 1982.

Respectfully submitted,

LAPPIN, ROSEN, GOLDBERG,
SLAVET, LEVENSON & WEKSTEIN

By IRA H. ZALEZNIK
One Boston Place
Boston, MA 02108
Tel: 437-1000

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
No. 82-15685

GEORGE DOBSON, as he is
Inspector of Buildings of
Marshfield
Plaintiff

vs.

BONNIE PARKERS, INC.
VENUS II, INC. and
H&M ENTERPRISES, INC.
Defendants

NOTICE OF APPEAL

Defendant hereby appeals to the Appeals Court from the final judgment entered in this action on November 8, 1982.

Respectfully submitted,

LAPPIN, ROSEN, GOLDBERG,
SLAVET, LEVENSON & WEKSTEIN

By IRA H. ZALEZNIK
One Boston Place
Boston, MA 02108
Tel: 437-1000

## APPENDIX H

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NOS. 82-0363-CV
82-0421-CV

MARSHFIELD FAMILY SKATELAND, INC., and others

*vs.*

TOWN OF MARSHFIELD and companion cases.

### ORDER

After hearing, it is ordered that the judgments in the underlying cases are stayed pending appeal, and that the town and its officers are enjoined from enforcing the provisions of General By-Law #48 pending appeal; that the appeals shall be processed on an accelerated basis, the merchants' brief or briefs to be filed and served on or before Friday, December 17, 1982, and the town's and building inspector's brief or briefs to be filed and served on or before January 7, 1983; and that, if the cases are not accepted for direct appellate review by the Supreme Judicial Court, the parties should prepare for hearing of the appeals on the merits at the January, 1983, sitting of this court.

By the Court (Armstrong, J.),

/s/ *Susan Miller*
Assistant Clerk

Entered: November 26, 1982.

## APPENDIX I

COMMONWEALTH OF MASSACHUSETTS.
Supreme Judicial Court for the Commonwealth,
At Boston, June 29, 1983

In the Case No. SJC-3043
MARSHFIELD FAMILY SKATELAND, INC. & others

*vs.*

TOWN OF MARSHFIELD
(and five consolidated cases)

pending in the Superior Court for the County of Plymouth Nos. 82-15569; -15864; -15865; -15593; -15596; -15597

### ORDER

It is hereby ORDERED, that the November 26, 1982 Order of the Appeals Court enjoining the enforcement of the judgments in Plymouth Superior Court cases numbered 82-1263, 82-1258, 82-1259, 82-1260, 82-1261, and 82-1262 is continued in force and effect until further order of this Court.

By the Court,
/s/ *Patrick J. Hurley*, Clerk.

June 29, 1983

**APPENDIX J**

SUPREME COURT OF THE UNITED STATES

No. A-9

MARSHFIELD FAMILY SKATELAND, INC., ET AL.,
Appellants,

v.

TOWN OF MARSHFIELD

ORDER

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the order of the Supreme Judicial Court of Massachusetts, case No. SJC - 3043, entered June 29, 1983, enjoining enforcement of the judgments in Plymouth Superior Court, case Nos. 82-1263, 82-1258, 82-1259, 82-1260, 82-1261, and 82-1262, be, and the same is hereby, continued pending the timely docketing of an appeal in the above-entitled cause. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the Supreme Judicial Court of Massachusetts is affirmed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the issuance of the mandate of this Court.

**/s/ William J. Brennan, Jr.**
**Associate Justice of the Supreme Court of the United States**
**A true copy Alexander L. Stevas**
**Test:**
**Clerk of the Supreme Court of the United States**
**By /s/ *Francis J. Carson***
**Chief Deputy**

**Dated this 12th day of July, 1983**

## APPENDIX K

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT
CIVIL ACTION
#82-15864
#82-15569
#82-15593
#82-15596
#82-15597
#82-15685

---

MARSHFIELD FAMILY SKATELAND, INC. et. al

Plaintiffs,

V.

TOWN OF MARSHFIELD,

Defendant

AND ALL CONSOLIDATED CASES

---

### STATEMENT OF AGREED FACTS

Plaintiffs Marshfield Family Skateland, Inc. et. al., and defendant Town of Marshfield hereby stipulate and agree that the following facts are true and accurate for purposes of this action only. The parties reserve the right to dispute the relevance and legal effect of any facts or document as set forth herein (but not the authenticity of any such document):

I. *The Parties*

1. Plaintiff Marshfield Family Skateland, Inc. ("Skateland") is a Massachusetts corporation with a usual place of business in Marshfield. Skateland operates a roller skating rink open to the public. In addition to the skating

rink, Skateland offers skates for rent, a pro shop, a snack bar with a variety of food and drink, a sound system for playing music, and coin-activated amusement games, including those commonly known as video games. There are currently six coin-activated amusement games on Skateland's premises, including two "pinball" games and four video games. One of the video games on Skateland's premises is the game "Kangaroo" made by Atari, Inc., a subsidiary of Warner Communications Company. Skateland first installed coin-activated amusement games in 1975 and has operated six coin-activated amusement games continuously since that time.

2. Thomas F. Vetra is a resident of Marshfield and owns and operates a retail grocery store under the name of Seaside General Store ("Seaside"). Seaside has been in business for over eleven years. In addition to groceries, Seaside sells health and beauty aids, games, penny candy, kites, tickets for the Massachusetts State Lottery, as well as other goods. Seaside maintains a stamp vending machine, a pay telephone, and a coin-operated scale. Seaside also has a television set, a radio and a police scanner. In addition, Seaside maintains four video games, including Pac-Man, and has maintained these games since June, 1982. Prior to the installation of these games, Seaside did not operate coin-activated amusement games. Seaside had contracted with an operator prior to the passage of the by-law in June. Although the contract could have been cancelled, Seaside installed the games after passage of the by-law believing the by-law to be invalid.

3. Ocean Street Canteen, Inc. ("Ocean Street") is a Massachusetts corporation with a usual place of business in Marshfield. Ocean Street operates a restaurant and commissary business. Ocean Street also maintains coin-

activated amusement games on its premises. At present, Ocean Street has two games although in the past it has operated as many as nine games. Ocean Street has operated coin-activated amusement games continuously since January, 1982. Prior to the installation of those video games, Ocean Street did not maintain coin-activated amusement games.

4. John D. Gunn is a resident of Marshfield. He is the owner and operator of a retail grocery store under the name of "Paddock Package Store." Paddock Package Store is a convenience market or variety store. It sells food, toiletries, cigarettes, alcoholic beverages, groceries, and other items. Paddock Package Store currently has three video games, including Pac-Man on its premises, although it has had four games in the past. Paddock Package Store has had video games on its premises continuously since May, 1982. Prior to installation, Paddock Package Store did not operate coin-activated amusement games.

5. Bonny Parkers, Inc. d/b/a Rafferty's ("Rafferty's") is a Massachusetts corporation with a usual place of business in Marshfield. Rafferty's is a restaurant and bar. It also holds a license for a juke box and for live entertainment. At present Rafferty's operates only one video game. It first operated coin-activated amusement devices, including pinball machines, in 1971. With the exception of 1980 and 1981, it has operated games since that time.

6. Venus II, Inc. ("Venus II") is a Massachusetts corporation with a usual place of business in Marshfield. Venus II is a restaurant and bar. Venus II has also juke box entertainment, live entertainment, and entertainment by television. Venus II now operates four amusement games, including Pac-Man and Space Invaders. Venus II

has operated coin-activated amusement games including pinball machines, shuffle alleys and the first video game "Pong" since 1971.

7. H & M Enterprises, Inc. is a Massachusetts corporation doing business in Marshfield. H & M Enterprises, Inc. owns and operates the Green Harbor General Store ("Green Harbor") in Marshfield. Green Harbor is a small retail food store or grocery store. In addition to selling groceries, Green Harbor sells liquor, milk and cigarettes. At present, Green Harbor operates two coin-activated amusement games. Green Harbor has operated video games since May, 1982. Prior to installing these video games, Green Harbor did not operate coin-activated amusement games.

8. BP Productions, Inc. d/b/a the Road House ("Road House") is a Massachusetts Corporation with a usual place of business in Marshfield. The Road House is a restaurant and bar. The Road House offers entertainment by means of a juke box, three televisions, music, dancing, and an occasional show featuring live entertainment. At present, the Road House operates four video games, including Ms. Pac-Man and Donkey Kong. The Road House has operated the video games continuously since 1980.

8A. Marshfield Sports Center, Inc. ("Sports Center") is a Massachusetts corporation with a usual place of business in Marshfield. The Sports Center is a public bowling alley. The Sports Center also has pool tables and eight coin-activated amusement games, including "Zaxxon", "Ms. Pac-Man", and "Donkey Kong". The Sports Center has had coin-activated games since 1967 and at least four games since 1975. For the past three years, the Sports Center has had eight games.

9. The Town of Marshfield is a body politic duly organized and existing in the Commonwealth of Massachusetts, Plymouth County.

10. George Dobson is the Inspector of Buildings for the Town of Marshfield and is the individual charged by law with the enforcement of zoning by-laws in the Town of Marshfield.

II. *General By-Law 48 of the Town of Marshfield*

11. Having been advised by Town Counsel in November 1981 that the commercial operation of coin-activated amusement games was a violation of the Marshfield Zoning by-law, the Board of Selectmen ceased issuing licenses for coin-activated amusement games, including video games in 1982. This policy was adopted pending presentation to the Town Meeting of a proposed new zoning by-law. The Selectmen also proposed a new general licensing by-law for the Town Meeting. Copies of both proposed by-laws are annexed hereto as Exhibits A and B respectively.

12. The proposed zoning by-law was defeated by the June 1982 Town Meeting. At the same Town Meeting, a substitute general by-law was offered to replace the one proposed by the Selectmen. The substitute proposal was offered by a citizen of the town, Thomas R. Jackson. The motion to substitute was passed by a vote of 191 to 19 and General By-Law #48 was approved by voice vote.

13. General By-Law #48 provides as follows:

(1) No person shall keep, or cause to be kept, operate or suffer to be operated, on premises owned or leased by him, or subject to his control, any mechanical or electronic automatic amusement device, whether coin-operated or not, (as defined under, but not limited to, Chapter 140, Section

177A(2) of the Massachusetts General Laws) except private in-home use, coin-operated juke boxes, pool, billiard, bowling and athletic training devices.

(2) Any person found violating the provisions of this by-law will be punished by a fine of $200 for each offense.

A true copy of General By-Law #48 is annexed hereto as Exhibit C.

14. On or about September 30, 1982, the Attorney General, pursuant to G.L. Ch. 40, §32, approved General By-Law #48.

15. On October 5, 1982, the Chief of Police of Marshfield inspected the plaintiffs' business premises. Since the plaintiffs were still operating video games, the Chief of Police informed them that he intended to commence enforcement proceedings, which could include the seizure of the games, if the games were not removed.

16. On October 6, 1982, Civil Action #82-15864 was commenced to seek injunctive and declaratory relief.

III. *Zoning Cases*

17. After the defeat of the proposed change to the Zoning By-law by the June 1982 Town Meeting, the Inspector of Buildings determined to enforce the Zoning By-Law that he had been advised prohibited all coin-activated amusement games. Prior to the commencement of these actions, no enforcement proceedings had ever been brought against the commercial operation of coin-activated amusement games in the Town.

18. The present Marshfield Zoning By-Law was adopted on June 12, 1972.

19. Article 5 of the Marshfield Zoning By-Law sets forth uses that are permitted, uses that are prohibited in certain zones, and uses permitted by special permit or exception.

20. Section 5.01 of the Marshfield Zoning By-Law states as follows: "Except as provided in the Zoning Enabling Act or in this By-Law, no building, structure, or land shall be used except for the purposes permitted in the district as described in this Section. Any use not listed shall be construed to be prohibited."

21. Immediately after section 5.04, the Marshfield Zoning By-Law lists 67 principal residential, community, agricultural, retail and service, and wholesale, transportation, and industrial uses. Immediately following the listing of the aforementioned principal uses, the Marshfield Zoning By-Law lists 17 accessory uses. Since the adoption of the Zoning By-Law, the Town Meeting has amended the By-Laws by adding additional uses under the Table of Accessory Uses.

22. Article 2 contains the following definitions:

a) Use: the purpose for which a structure or lot is arranged, designed, or intended to be used, occupied or maintained.

b) Use, Accessory: a use incidental and subordinate to the principal use of a structure or lot, or a use, not the principal use, which is located on the same lot as the principal structure. Accessory use by area shall be interpreted not to exceed 40% of the area to the total use of the structure and/or lot on which it is located.

c) Use, Principal: the main or primary purpose for which a structure or lot is designed, ar-

ranged, or intended, or for which it may be used, occupied or maintained under this By-Law. Any other use within the main structure or the use of any other structure or land on the same lot and incidental or supplementary to the principal use and permitted under this By-Law shall be considered an accessory use.

23. A complete copy of the Zoning By-Law for the Town of Marshfield is annexed hereto and incorporated herein as Exhibit D.

24. On or about July 22, 1982, George Dobson, as Inspector of Buildings, served a Notice of Zoning Violation and Order upon Thomas F. Vetra, Ocean Street, John D. Gunn, Rafferty's, Venus, Green Harbor and The Road House.

25. A representative copy of the notice of zoning violation and order is annexed hereto and incorporated herein as Exhibit E.

26. Thomas F. Vetra, Ocean Street, John D. Gunn, Rafferty's, Venus II, Green Harbor, and The Road House did not cease to operate their coin-activated amusement games in response to the notice issued by George Dobson.

27. In August, 1982, George Dobson commenced these actions seeking to enforce his interpretation of the Marshfield Zoning By-Law.

IV. *Video Games*

28. A video game is a coin-activated amusement game. A video game is typically built in an upright wooden cabinet approximately 70 inches in height, 25 inches in width, and 36 inches in depth. Other models include smaller cabinets and cocktail table games.

29. The component parts of a video game are a micro-processor (a computer), electronic control circuitry, a television monitor, and a control panel for player operation. In the play mode, after a coin is deposited and the controls are operated by the game player, the computer is programed to combine with the electronic control circuitry to produce a continuous audio-visual display.

30. The television monitors used with video games differ from a home television screen in their ability to intensify colors and lines to produce a clearer and more distinct image.

31. The video games' computer program today is fixed in a memory device known as a ROM (read only memory). The computer program in the ROM contains all of the instructions for the computer to follow in response to each movement of the game controls by the player. ROMs are typically one inch by ½ inch, dark ceramic material with pins coming out of it.

32. When the player operates the controls, the movement is transmitted by the micro-processors and is analyzed in accordance with the program contained in the ROM. The micro-processor then immediately determines the proper instruction to be transmitted to the RAM (random access memory), which is a second memory device contained within the machine.

33. The RAM contains the codes for the pictures that are to be reproduced on the screen, and contains in its memory the instructions for reproducing every visual image on the screen.

34. The electronic circuitry in a video game enables the player controls, the ROM, the RAM, and the video screen to interact instantaneously, thereby producing the continuous visual display.

35. All video games combine visual images with sound effects, including tones and, occasionally, speech. Each machine contains audio-generation circuitry that produces the sound effects required by the video game program. The sounds are selected by the program and are reproduced through the electronics in the game.

36. Each video game has two basic modes: an attract mode and a play mode.

37. The attract mode is a fixed sequence of events, usually showing the player the name of the game, the copyright, how to play the game, and a table of high scores. The sequence of events in the attract mode is programmed in the ROM and will not change until the player deposits a coin to change the mode into the play mode.

38. The video game "Pac-Man" is manufactured by the Midway Manufacturing Company. Pac-Man is one of the most popular video games ever to be produced. Since its release in 1980, over 95 thousand Pac-Man machines have been manufactured, far above average production. In 1981, Midway Manufacturing Company made the video game "Ms. Pac-Man". Over 100,000 Ms. Pac-Man games have been sold.

39. In the Pac-Man game, the television screen depicts a maze with dots placed in the paths. Pac-Man is a round, yellow image with a mouth-like opening that can be controlled by the player and moved throughout the maze. When the mouth-like opening intersects with the dots, the dots disappear from the screen. Four so-called ghost images also appear on the screen. When these images intersect with the Pac-Man image, the Pac-Man whines, deflates and then disappears with a star burst.

40. Each ghost image has a different color, is given a name and is programmed to respond differently. For ex-

ample, the light blue ghost image (named "Inky") is programmed to avoid face to face confrontations with the Pac-Man image. The red ghost image (named "Blinky") is programmed to follow consistently the Pac-Man image throughout the maze.

41. Each ghost image has moving eyes that tell the player the direction in which the ghost character is moving.

42. The object of the Pac-Man game is to have Pac-Man clear the maze of all the dots to score points, eat fruit symbols that are displayed at random in the maze to score points, and to avoid being caught by the ghost figures.

43. At four points on the maze are enlarged dots called power capsules. If Pac-Man eats a power capsule, the roles reverse; the ghosts turn blue and Pac-Man can eat and deflate the ghosts. Points are scored for each successive ghost eaten. If a ghost is eaten, only its eyes remain and they then go back to the ghost "pen" in the center of the maze and the ghost character is regenerated. After a specified period of time, the ghosts will flash from blue to their normal colors signifying that the ghosts are about to become hunters again.

44. When the Pac-Man has cleared an entire screen of the dots, the movement stops for a moment and a new screen will appear for another round. Each round is identified by a fruit symbol at the bottom of the screen. After a certain number of mazes have been cleared, both Pac-Man and Ms. Pac-Man games display an interlude with music. These interludes have been called "Half-Time" by the manufacturer of the games.

45. Upon deposit of a quarter, the player starts with three Pac-Man characters and an additional Pac-Man is awarded as a bonus after the player has amassed ten thou-

sand points. The basic principles of play are the same for both Pac-Man and Ms. Pac-Man. Both games use a single, moveable knob or "joystick" for the player control. Attached as Exhibit F is a photograph of the Pac-Man game. Exhibit G is a photograph of the Pac-Man maze. Exhibit H is a photograph of the Ms. Pac-Man game. Exhibit I is a photograph of the Ms. Pac-Man maze.

46. The attract mode in the Pac-Man game shows the four ghosts figures and introduces them by name. After the introduction, the attract mode shows a sequence of Pac-Man eating and being pursued by the ghosts. Pac-Man, like other video games, has a mechanism whereby the player can record his or her high score in the computer's memory. The computer displays these high scores as a permanent record and these high scores are displayed in the attract mode. The Ms. Pac-Man attract mode is similar to the Pac-Man attract mode.

47. The video game "Donkey Kong" is manufactured by Nintendo of America, Inc.

48. In Donkey Kong, a gorilla is depicted taking a woman figure to the top of a sky scraper.

49. The player controls the figure of a character named Mario. The player must maneuver Mario to climb ladders and other objects to rescue the woman while avoiding barrels, fireballs and other hazards placed in his path by the gorilla. The player controls the movement of Mario with a joystick and can press a button to make Mario jump or catch objects.

50. The video game "Zaxxon" is manufactured by Gremlin Industries, Inc., a subsidiary of Gulf and Western Industries, Inc.

51. In Zaxxon, the player maneuvers an aircraft through a simulation of space and a fortress. Along the flight, the player must avoid obstacles, shoot at various objects for points and watch over an altitude gauge and fuel supply indicator. If the player successfully avoids these pitfalls, the player is confronted with a robot-like object with a homing missile. Annexed hereto as Exhibit J is a picture of the game Zaxxon. Exhibit K is a picture of Zaxxon's video screen.

52. The video game "Tron" is manufactured by the Midway Manufacturing Company, a Bally Company.

53. In Tron, the player selects from four modes of play. Two modes include a tank chase in a maze and a player maneuvering a figure into a safe core area. At the beginning and conclusion of each mode, the player selects the next mode from the grid that appears on the screen.

54. The video game "Kangaroo" is manufactured by Atari, Inc., a subsidiary of Warner Communications Company.

55. In Kangaroo, the player must maneuver a Kangaroo to rescue her baby who is being held captive at the top of the screen by small monkeys. The player uses a joystick to move the Kangaroo to jump over obstacles and to duck apples hurled by the monkeys. The player may press a button to enable the Kangaroo to "punch" out the monkeys.

56. Ms. Pac-Man, Donkey-Kong, Zaxxon, Tron and Kangaroo are considered to be among the most sophisticated games available. Donkey-Kong and Kangaroo are examples of what the industry refers to as "thematic games" while Zaxxon is an example of what is referred to as a "shoot 'em up" game.

V. *The Amusement Game Industry*

57. The Amusement Game Industry has traditionally been divided into four tiers: manufacturer, distributor, operator, and location owner. This structure has remained, even with the advent of new video game products.

58. At the manufacturing level, companies design, develop, and assemble the games. The production of a video game is typically a joint effort of a design team. Each team usually has a graphics designer, an animator, a composer, an engineer, and a computer programmer. Game ideas must first be developed, translated into a computer program, manufactured into a prototype, tested, and then mass produced and marketed. Each manufacturer devotes millions of dollars to the research and development of a single game.

59. Manufacturers estimate that there are approximately one billion dollars worth of games in current operation. Some of the principal manufacturers of coin-activated amusement games are subsidiaries of entertainment companies such as Warner Communications, Inc. (Atari, Inc.) and Gulf and Western Industries, Inc. (Gremlin Industries, Inc.).

60. The manufacturers sell their products to regional distributors. Distributors are the sales representatives for the manufacturers of the equipment. The distributors sell and service the equipment. Distributors typically sell games for between $2,000 and $3,000. In this region, the primary distributors of coin-activated amusement games are Bally Northeast Distributing, Inc. in Norwood, Massachusetts, a subsidiary of the Bally Manufacturing Company, Inc. and Rowe International, Inc. in Dedham, Massachusetts, a subsidiary of Triangle Industries.

61. Distributors usually sell coin-activated amusement games to operators. Operators are typically vending companies that supply equipment to locations on a lease or commission basis. Usually, title to the equipment remains vested in the operator, the operator services the equipment, and rotates equipment along its vending route from one location to another.

62. The location owner is responsible for supervising the use of the equipment on its premises. The gross receipts of a video game are usually divided between operator and location owner on an agreed upon basis, either in the form of a commission or as a lease payment. Industry surveys estimate that in 1982, players spent between five and eight billion dollars on coin-activated amusement games.

63. Replay Magazine, a coin-activated amusement game industry trade journal, has estimated in a survey that sixteen percent of the video game-playing market is under age 13, forty-two percent is between 13 and 19, twenty-nine percent is between 20 and 30, and thirteen percent is over the age of 30.

64. Replay Magazine has found in a survey of operators that the most desirable and profitable locations for the placement of coin-activated amusement games from the operators' perspective are arcades (featuring only coin-activated amusement games), other recreation centers like bowling alleys and movie theatres, restaurants and bars, and in variety stores.

VI. *Miscellaneous*

65. The Town of Marshfield is a predominately middle to upper-middle class suburban community located on the coast, thirty miles south of Boston. The year round population of the town is about 21,000 people. Marshfield is

also a summer resort community. Summer residents number about 15,000 people, bringing total population during the summer months to about 36,000. Virtually all of the summer population increase occurs in the beach areas of the town. Five of the nine businesses that are parties herein are located in the beach areas of the town.

66. Various entertainments are offered to the public in Marshfield. Each summer, there is the Marshfield Fair, which has included a tent containing coin-activated amusement games among its attractions. The Marshfield Jaycees operate a "haunted house" for a week and the Boston Celtics have held training camps at Camp Milbrook in Marshfield. The Elks have run "Las Vegas" nights.

67. Many permanent facilities offer forms of entertainment to the public.

68. In 1982, Noah's Oceanside, Inc., 26 Old Beach Road, was given a common victualler's license, an all-alcoholic beverages license, a license for dancing, and a license for a juke box.

69. The Brothers Four, Inc. d/b/a The Ranch House, on 222 Canal Street, received a license in 1982 as a common victualler, licenses for dancing, for an orchestra and a juke box, and a license for pool tables.

70. Papa Gino's of America, Inc., 1897 Ocean Street, was licensed in 1982 as a common victualler and also has a juke box license. Papa Gino's has held these licenses continuously since 1976.

71. The Shoals Restaurant, Inc. d/b/a The Shoals, 915 Ocean Street, was licensed as a common victualler, was granted a juke box license, and a license for dancing. The Shoals has been conducting these activities since 1976.

72. Sullivan's Fairview Hotel, 133 Ocean Street, was given a license in 1982 as an innholder, a common victualler, and received a license for a juke box.

73. The Marshfield Breakers, Inc., 247 Ocean Street, has a seasonal alcoholic beverages license, is licensed as common victualler, and has licenses for dancing, juke box and an orchestra. These licenses have been outstanding since 1976.

74. The Brideway Inn, Inc. on Sea and Ferry Streets, has been licensed as an innholder, as a common victualler, maintains an innholder's all-alcoholic license, and is licensed for dancing. This establishment also had these licenses in 1981.

75. The Casa Berrini has an all-alcoholic beverages license, a common victualler's license, a dancing license, a juke box and an orchestra license. These licenses have been outstanding since 1980.

76. Burke's Beach Trust on Beach Street has a common victualler's license and a juke box license. These licenses have been outstanding since 1976.

77. No enforcement proceedings have been brought and no enforcement proceedings are pending against any of these establishments.

Respectfully submitted,

/s/ *Robert Marzelli*
Robert Marzelli
Billingham & Marzelli
95 Church Street
Pembroke, MA 02358
Tel: 826-8411
Attorney for Defendant
Town of Marshfield

/s/ *Ira H. Zaleznik*
Ira H. Zaleznik
Lappin, Rosen, Goldberg,
Slavet, Levenson & Wekstein
One Boston Place
Boston, MA 02108
Tel: 437-1000
Attorney for Plaintiffs

## APPENDIX L

### ARTICLE V

### USE REGULATIONS

Section 5.01 *Applicability of Use Regulations.* Except as provided in the Zoning Enabling Act or in this Bylaw, no building, structure, or land shall be used except for the purposes permitted in the district as described in this Section. Any use not listed shall be construed to be prohibited.

Section 5.02 *Permitted Uses.* In the following Table of Use Regulations the uses permitted by right in the district shall be designated by the letter (P). Those uses that may be permitted as an exception by special permit in the district, in accordance with Article X, shall be designated by the letter (S). Uses designated (-) shall not be permitted in the district.

Section 5.03 *Uses Subject to Other Regulations.* Uses permitted by right or by special exception shall be subject, in addition to use regulations, to all other provisions of this Bylaw.

Section 5.04 *Table of Use Regulations.* See table on accompanying pages which is declared to be a part of this Bylaw. In addition, uses are subject to Articles XI and XII, where appropriate.

Table of Use Regulations (Continued)

| Accessory Uses | Residential | | | Business | | | | | Industrial | |
|---|---|---|---|---|---|---|---|---|---|---|
| | R-1 | R-2 | R-3 | OP | B-1 | B-2 | B-3 | B-4 | I-1 | A |
| ACCESSORY USES | | | | | | | | | | |
| 1. Home occupation (see Section 11.07) | S | S | S | — | P | P | P | P | — | — |
| 2. Private day nursery or kindergarten, provided it shall not occupy more than 40 percent of the gross floor area of the structure and there shall be a minimum of 75 square feet of outside play area for each enrolled child | S | S | S | — | — | — | — | — | — | — |
| 3. Accessory professional office of a licensed medical or dental practitioner, lawyer, engineer, optometrist or public accountant in an existing dwelling | S | S | S | P | P | P | P | P | — | — |
| 4. Accessory building such as a greenhouse; tool shed; private swimming pool, or similar accessory structures. Subject to provisions of Article VI. | P | P | P | — | P | P | P | P | S | P |
| 5. Accessory private garage for not more than three noncommercial motor vehicles, and, except on a farm not more than one half-ton rated or less in size commercial motor vehicle | P | P | P | — | P | P | — | P | — | — |

Table of Use Regulations (Continued)

| Accessory Uses | Residential | | | Business | | | | | Industrial | |
|---|---|---|---|---|---|---|---|---|---|---|
| | R-1 | R-2 | R-3 | OP | B-1 | B-2 | B-3 | B-4 | I-1 | A |
| 6. Accessory storage of a trailer, unregistered automobile, boat or accessory marine agriculture equipment provided: it shall either be stored within a principal or accessory building or not less than 25 feet from any front lot line and 10 feet from any side lot line and it shall not be used for dwelling or sleeping purposes. Maximum number—two trailers and autos and boats | P | P | P | — | P | P | — | P | — | — |
| 7. Accessory repair and storage facilities in any retail sales or consumer establishment provided: it shall not occupy more than 25 percent of the gross floor area | — | — | — | — | P | — | P | P | — | — |
| 8. Accessory outside storage clearly necessary to the operation and conduct of a permitted principal wholesale, transportation, industrial and/or commercial use | — | — | — | — | S | S | S | S | P | P |
| 9. Accessory manufacuring use provided: it shall not occupy more than 25 percent of the gross floor area of the building; and it shall not be located within 100 feet of any "R" District or within 50 feet of any street lot line | — | — | — | — | S | P | — | — | P | P |

Table of Use Regulations (Continued)

| Accessory Uses | Residential | | | Business | | | | | Industrial | |
|---|---|---|---|---|---|---|---|---|---|---|
| | R-1 | R-2 | R-3 | OP | B-1 | B-2 | B-3 | B-4 | I-1 | A |
| 10. Accessory building to a non-residential principal use occupied by a person employed on the premises and his immediate family, unless such structure is located in the rear of the principal building and has no immediate street frontage | — | — | — | — | P | S | P | S | S | S |
| 11. Newstand, barber shop, dining room or cafeteria and similar accessory services only for occupants or users thereof within a hotel, office, or industrial building, hospital containing more than 50 sleeping rooms, or transportation terminal facility | P | P | P | S | P | P | P | P | P | P |
| 12. Up to two lodging units in an existing dwelling | P | P | P | — | S | S | S | P | — | — |
| 13. Accessory signs subject to the provisions of Article VII | P | P | P | P | P | P | P | P | P | P |
| 14. Accessory off-street parking and loading spaces as required in Article VIII | P | P | P | P | P | P | P | P | P | P |
| 15. Licensed Day Care Centers | S | S | S | S | S | S | S | S | S | S |

*16. Trailers: to be used as a temporary office in connection with a construction project provided that the use is authorized by the Board of Selectmen and further provided that the trailer is not used for family habitation; trailers to be parked and occupied for a period of not more than six (6) months by the owner of the premises provided that the use is authorized by the Board of Selectmen and further provided that such owner is in the process of constructing or reconstructing a house thereon for his own occupancy and further provided that there are suitable facilities for running water and sanitary sewage disposal as approved by the Board of Health and further provided that not more than one six-month extension is granted; trailer to be parked and occupied for family use for a period of not more than ten (10) days or for charitable, agricultural, religious, veterans, or other non-profit purposes for not more than ten (10) days provided that the use is authorized by the Board of Selectmen and further provided that there are suiatble facilities for running water and sanitary sewage disposal as approved by the Board of Health. For the purpose of this by-law, a trailer shall be defined to be of any trailer-type body, whether mobile or immobile.

| R-1 | R-2 | R-3 | OP | B-1 | B-3 | B-4 | I | A |
|---|---|---|---|---|---|---|---|---|
| P | P | P | P | P | P | P | P | P |

* Adopted under Article 71 of Annual Town Meeting of May 6, 1974. Approved by the Attorney General August 2, 1974.

Office - Supreme Court, U.S.
FILED
OCT 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-535.

# In the

# Supreme Court of the United States.

OCTOBER TERM, 1983.

MARSHFIELD FAMILY SKATELAND, INC., THOMAS F. VETRA, OCEAN STREET CANTEEN, INC., BONNIE PARKERS, INC., VENUS II, INC., H & M ENTERPRISES, INC., BP PRODUCTIONS, INC., AND MARSHFIELD SPORTS CENTER, INC.,
APPELLANTS,

*v.*

TOWN OF MARSHFIELD,
(AND FOUR CONSOLIDATED CASES.)
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

**Motion to Dismiss or Affirm.**

ROBERT L. MARZELLI,
BILLINGHAM & MARZELLI,
95 Church Street,
North Pembroke, Massachusetts 02358.
(617) 826-8411

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## Questions Presented.

1. Does town of Marshfield, Massachusetts, General Bylaw No. 48, which as construed by the Supreme Judicial Court of Massachusetts prohibits the commercial operation of all but certain specified coin-activated amusement devices, impermissibly abridge the freedom of speech and association guaranteed by the First Amendment?

2. Does General Bylaw No. 48, by its prohibition of the commercial operation of most coin-activated amusement devices, but no other forms of amusement, violate the due process or equal protection clauses of the Fourteenth Amendment?

3. Does the town of Marshfield Zoning Bylaw which prohibits the operation of coin-activated amusement devices as an accessory use in all zoning districts of the town impermissibly abridge the freedom of speech and association guaranteed by the First Amendment?

4. Does the town of Marshfield Zoning Bylaw, by its prohibition of the operation of coin-activated amusement devices as accessory uses in all zoning districts, violate the due process or equal protection clauses of the Fourteenth Amendment?

## Table of Contents.


| | |
|---|---|
| Motion to dismiss or affirm | 1 |
| Constitutional and statutory provisions involved | 2 |
| Statement of the case | 8 |
| Reasons why appeal should be summarily dismissed | 9 |
| I. There is no conflict between the decision of the Supreme Judicial Court of Massachusetts and the decisions of this court or any other federal or state court of record | 10 |
| II. The appellants have advanced no compelling legal issue of demonstrated public importance sufficient to warrant further interpretation of the First Amendment by this court | 10 |
| III. A reversal of the decision of the Massachusetts court on First Amendment grounds would create the right to play trivial arcade games as one of the cornerstone freedoms of our society | 11 |
| IV. The legal issues presented for review in the four zoning cases are cloudy and imprecise | 11 |
| V. The decision of the Supreme Judicial Court on the federal constitutional questions raised by appellants is clearly correct | 12 |
| Conclusion | 17 |
| Supplemental appendix | follows 17 |


## Table of Authorities Cited.

### Cases.


| | |
|---|---|
| Alladin's Castle, Inc. v. Village of North Riverside, 66 Ill. App. 3d 542 (1978) | 17n |

America's Best Family Showplace Corp. v. City of New York, 536 F. Supp. 170 (E.D.N.Y. 1982) 10

Broaderick v. Oklahoma, 413 U.S. 601 (1973) 16

California v. La Rue, 409 U.S. 109 (1972) 12

Cohen v. California, 403 U.S. 15 (1971) 12, 13

Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, appeal dismissed, 371 U.S. 36 (1962) 17

Cox v. State of Louisiana, 379 U.S. 536 (1965) 13

Dandridge v. Williams, 397 U.S. 471 (1970) 16

Dollcraft Industries Ltd. v. Wellmade Toy Mfg. Co., 201 U.S. P.Q. 708 (E.D.N.Y. 1978) 16n

Ginsberg v. New York, 390 U.S. 629 (1968) 16

Grayned v. City of Rockford, 408 U.S. 104 (1972) 12

Joseph Brustyn, Inc. v. Wilson, 343 U.S. 495 (1952) 12

Malden Amusement Co. v. City of Malden, No. 82-1840-S (D. Mass. Jan. 25, 1983) 10

Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950) 11

McGowan v. Maryland, 366 U.S. 420 (1981) 16

Monogram Models, Inc. v. Industro Motive Corp., 492 F.2d 1281, cert. denied, 419 U.S. 843 (1974) 16n

Otman v. City of Palos Hills, (No. 82, c. 3568, Circuit Court of Cook County, Ill. (1982) 17n

Red Lion Broadcasting v. F.C.C., 395 U.S. 367 (1969) 12

Roth v. United States, 354 U.S. 476 (1957) 13

Rothner v. City of Des Plaines, 554 F. Supp. 465 (N.D. Ill. 1981) 10

Schacht v. United States, 398 U.S. 58 (1970) 12

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) 14
Spence v. Washington, 418 U.S. 405 (1974) 12, 13
Stern Electronics, Inc. v. Kaufman, 669 F.2d 852 (2d Cir. 1982) 10
Street v. New York, 394 U.S. 576 (1969) 12
Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1968) 13
United States v. O'Brien, 391 U.S. 367 (1968) 13
Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982) 14n
Winters v. New York, 333 U.S. 507 (1948) 12
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 12

CONSTITUTIONAL PROVISIONS.

First Amendment *passim*
Fourteenth Amendment *passim*

STATUTES.

Marshfield General Bylaw No. 48 *passim*
Marshfield Zoning Bylaw *passim*

MISCELLANEOUS.

Annotation, 26 ALR Fed. 408-420 16n
Boston Globe, Sept. 9, 1983 10n

Brooks, Exploring the Arcade Myths, Electronic Games, Aug. 1982 17n

C.E. Kopp, Speech at University of Pittsburgh, Nov. 9, 1982 17n

T. Emerson, The System of Freedom of Expression (1970) 13

L. Tribe, American Constitutional Law (1978) 13

No. 83-535.

# In the

# Supreme Court of the United States.

OCTOBER TERM, 1983.

MARSHFIELD FAMILY SKATELAND, INC., THOMAS F. VETRA, OCEAN STREET CANTEEN, INC., BONNIE PARKERS, INC., VENUS II, INC., H & M ENTERPRISES, INC., BP PRODUCTIONS, INC., AND MARSHFIELD SPORTS CENTER, INC.,
APPELLANTS,

*v.*

TOWN OF MARSHFIELD,
(AND FOUR CONSOLIDATED CASES.)
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

**Motion to Dismiss or Affirm.**

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Judicial Court of Massachusetts on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

## Constitutional and Statutory Provisions Involved.

In addition to the constitutional and statutory provisions set out by appellants in their jurisdictional statement, the following statute is also involved in this appeal.

The town of Marshfield Zoning Bylaw provides in pertinent part:

### Article V.

USE REGULATIONS.

Section 5.01 Applicability of Use Regulations. Except as provided in the Zoning Enabling Act or in this Bylaw, no building, structure, or land shall be used except for the purposes permitted in the district as described in this Section. Any use not listed shall be construed to be prohibited.

Section 5.02 Permitted Uses. In the following Table of Use Regulations the uses permitted by right in the district shall be designated by the letter (P). Those uses that may be permitted as an exception by special permit in the district, in accordance with Article X, shall be designated by the letter (S). Uses designated (-) shall not be permitted in the district.

Section 5.03 Uses Subject to Other Regulations. Uses permitted by right or by special exception shall be subject, in addition to use regulations, to all other provisions of this Bylaw.

Section 5.04 Table of Use Regulations. See table on accompanying pages which is declared to be a part of this Bylaw. In addition, uses are subject to Articles XI and XII, where appropriate.

## Table of Use Regulations (Excerpt).

| Principal Uses | Residential R-1 | R-2 | R-3 | OP | Business B-1 | B-2 | Industrial B-3 | B-4 | I-1 | A |
|---|---|---|---|---|---|---|---|---|---|---|
| 17. Boat marina or boat yard | — | — | S | — | — | — | — | P | — | — |
| 18. Miscellaneous business repair service | — | — | — | — | P | S | — | — | S | — |
| 19. Motion picture establishment, outdoor | — | — | — | — | — | S | — | — | — | — |
| 20. Motion picture establishment, indoor | — | — | — | — | P | P | — | P | — | — |
| 21. Other amusement and recreation service, outdoor except amusement parks | — | — | — | — | — | S | — | S | — | — |
| 22. Other amusement and recreation service, indoor except coin-operated devices | — | — | — | — | S | S | — | S | — | — |
| 23. Communications and television tower | S | S | — | — | — | — | — | — | S | S |
| 24. Commercial parking lot (see Article VIII) | — | — | S | — | P | P | P | P | S | S |
| 25. Filling of land or water area (see Section 11.03) | S | S | S | S | S | S | S | S | S | S |
| 26. Planned business development (see Section 11.05) | — | — | — | — | S | S | S | S | — | S |
| 27. Construction of drainage facilities (other than essential services) or damming up or relocating any watercourse, water body or wetlands | S | S | S | S | S | S | S | S | S | S |
| WHOLESALE, TRANSPORTATION AND INDUSTRIAL | | | | | | | | | | |
| 1. Removal of soil, loam, sand, gravel, quarry, or other earth material | NOW GENERAL BYLAW Refer to Article 13 — Special Town Meeting June 12, 1972 | | | | | | | | | |

## Table of Use Regulations (Continued).

| Accessory Uses | Residential R-1 | R-2 | R-3 | OP | Business B-1 | B-2 | Industrial B-3 | B-4 | I-1 | A |
|---|---|---|---|---|---|---|---|---|---|---|
| ACCESSORY USES | | | | | | | | | | |
| 1. Home occupation (see Section 11.07) | S | S | S | — | P | P | P | P | — | — |
| 2. Private day nursery or kindergarten, provided it shall not occupy more than 40 percent of the gross floor area of the structure and there shall be a minimum of 75 square feet of outside play area for each enrolled child | S | S | S | — | — | — | — | — | — | — |
| 3. Accessory professional office of a licensed medical or dental practitioner, lawyer, engineer, optometrist or public accountant in an existing dwelling | S | S | S | P | P | P | P | P | — | — |
| 4. Accessory building such as a greenhouse; tool shed; private swimming pool, or similar accessory structures. Subject to provisions of Article VI. | P | P | P | — | P | P | P | P | S | P |
| 5. Accessory private garage for not more than three noncommercial motor vehicles, and, except on a farm not more than one half-ton rated or less in size commercial motor vehicle | P | P | P | — | P | P | — | P | — | — |

## Table of Use Regulations (Continued).

| Accessory Uses | Residential R-1 | R-2 | R-3 | OP | Business B-1 | B-2 | B-3 | Industrial B-4 | I-1 | A |
|---|---|---|---|---|---|---|---|---|---|---|
| 6. Accessory storage of a trailer, unregistered automobile, boat or accessory marine agriculture equipment provided: it shall either be stored within a principal or accessory building or not less than 25 feet from any front lot line and 10 feet from any side lot line and it shall not be used for dwelling or sleeping purposes. Maximum number — two trailers and autos and boats | P | P | P | — | P | P | — | P | — | — |
| 7. Accessory repair and storage facilities in any retail sales or consumer establishment provided: it shall not occupy more than 25 percent of the gross floor area | — | — | — | — | P | — | P | P | — | — |
| 8. Accessory outside storage clearly necessary to the operation and conduct of a permitted principal wholesale, transportation, industrial and/or commercial use | — | — | — | — | S | S | S | S | P | P |
| 9. Accessory manufacturing use provided: it shall not occupy more than 25 percent of the gross floor area of the building; and it shall not be located within 100 feet of any "R" District or within 50 feet of any street lot line | — | — | — | — | S | P | — | — | P | P |

## Table of Use Regulations (Continued).

| Accessory Uses | Residential R-1 | R-2 | R-3 | OP | Business B-1 | B-2 | Industrial B-3 | B-4 | I-1 | A |
|---|---|---|---|---|---|---|---|---|---|---|
| 10. Accessory building to a non-residential principal use occupied by a person employed on the premises and his immediate family, unless such structure is located in the rear of the principal building and has no immediate street frontage | — | — | — | — | P | S | P | S | S | S |
| 11. Newstand, barber shop, dining room or cafeteria and similar accessory services only for occupants or users thereof within a hotel, office, or industrial building, hospital containing more than 50 sleeping rooms, or transportation terminal facility | P | P | P | S | P | P | P | P | P | P |
| 12. Up to two lodging units in an existing dwelling | P | P | P | — | S | S | S | P | — | — |
| 13. Accessory signs subject to the provisions of Article VII | P | P | P | P | P | P | P | P | P | P |
| 14. Accessory off-street parking and loading spaces as required in Article VIII | P | P | P | P | P | P | P | P | P | P |
| 15. Licensed Day Care Centers | S | S | S | S | S | S | S | S | S | S |

*16. Trailers: to be used as a temporary office in connection with a construction project provided that the use is authorized by the Board of Selectmen and further provided that the trailer is not used for family habitation; trailers to be parked and occupied for a period of not more than six (6) months by the owner of the premises provided that the use is authorized by the Board of Selectmen and further provided that such owner is in the process of constructing or reconstructing a house thereon for his own occupancy and further provided that there are suitable facilities for running water and sanitary sewage disposal as approved by the Board of Health and further provided that not more than one six-month extension is granted; trailer to be parked and occupied for family use for a period of not more than ten (10) days or for charitable, agricultural, religious, veterans, or other non-profit purposes for not more than ten (10) days provided that the use is authorized by the Board of Selectmen and further provided that there are suitable facilities for running water and sanitary sewage disposal as approved by the Board of Health. For the purpose of this by-law, a trailer shall be defined to be of any trailer-type body, whether mobile or immobile.

| R-1 | R-2 | R-3 | OP | B-1 | B-3 | B-4 | I | A |
|---|---|---|---|---|---|---|---|---|
| P | P | P | P | P | P | P | P | P |

*Adopted under Article 71 of Annual Town Meeting of May 6, 1974. Approved by the Attorney General August 2, 1974.

## Statement of the Case.

These cases involve challenges to two municipal bylaws of the town of Marshfield, Massachusetts, a Zoning Bylaw and a General Bylaw (No. 48). In the state courts there were six separate cases which were consolidated for trial pursuant to motion of the appellants. Five of the six cases involved only the Zoning Bylaw, while the sixth involved only General Bylaw No. 48.

In the trial court the town and its building inspector prevailed in all six cases. All the cases were appealed to the Supreme Judicial Court, which, in an opinion issued June 13, 1983, affirmed all six judgments. Only five of the six cases have been appealed to this Court, four cases involving the Zoning Bylaw and one involving the General Bylaw No. 48.[1]

The Supreme Judicial Court construed General Bylaw No. 48 to prohibit "the commercial operation of coin-activated amusement devices," (1a, *infra*); and as so construed held the bylaw valid. With respect to the Zoning Bylaw the Massachusetts Court said, "Since we uphold the express prohibition of coin-activated amusement devices under General Bylaw No. 48, we need not address the issues raised with regard to the more general provisions of the 1972 zoning bylaw," (5a, *infra*).[2]

The pleadings will show, (25a-34a, *infra*), that appellants raised their rights under the First and Fourteenth Amend-

---

[1] Appellants have virtually ignored the Zoning Bylaw in their jurisdictional statement. The Zoning Bylaw is reproduced in the appendix to the jurisdictional statement at pp. 57-61, but is not mentioned in appellants' statement of questions presented for review or in their argument. Note that General Bylaw No. 48 was not involved in the zoning cases.

[2] Appellees interpret this to mean that since an explicit prohibition of coin-activated amusements is constitutional, a general prohibition of uses, which includes such devices in its ambit, is not invalid by reason of such inclusion.

ments by counterclaim in the zoning cases. The Supreme Judicial Court affirmed trial court judgments which upheld the town's right through its Zoning Bylaw to "prohibit the operation of coin-activated amusement games as an accessory use" (20a and 23a, *infra*). Appellants seek review of all judgments. Thus the issue of the constitutionality of the Zoning Bylaw's prohibition of coin-activated amusements as an accessory commercial use is properly and inevitably before the Court.

During the pendency of the present actions the town has been enjoined by the state courts, and finally by this Court, from enforcing either General Bylaw No. 48, or the Zoning Bylaw insofar as the latter applies to coin-activated amusement devices. These devices therefore continue to operate in the town in an unregulated manner.

## Reasons why Appeal should be Summarily Dismissed.

The appellants ask the Court to declare that the playing of certain types of coin-activated amusement devices, commonly called "video games," is a form of speech or expression fully protected by the First Amendment to the United States Constitution.

In the alternative appellants ask the Court to hold that the prohibition of coin-activated amusement devices, but not other forms of entertainment, by General Bylaw No. 48, violates their right to due process and equal protection under the Fourteenth Amendment, because such a prohibition is not rationally related to a permissible objective of the police power.

As reasons why the case should not be marked for oral argument but instead should be summarily dismissed, the appellees offer the following:

I. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS AND THE DECISIONS OF THIS COURT OR ANY OTHER FEDERAL OR STATE COURT OF RECORD.

All the courts which have considered the question of whether coin-activated video games are a form of speech protected by the First Amendment have decided that such games are not so protected. *Malden Amusement Co.* v. *City of Malden*, No. 82-1840-S (D. Mass. Jan. 25, 1983); *America's Best Family Showplace Corp.* v. *City of New York*, 536 F. Supp. 170, 173-174 (E.D. N.Y. 1982) (quoting *Stern Electronics, Inc.* v. *Kaufman*, 669 F.2d 852, 857 (2d Cir. 1982); see also, *Rothner* v. *City of Des Plaines*, 554 F. Supp. 465, 466 (N.D. Ill. 1981).

II. THE APPELLANTS HAVE ADVANCED NO COMPELLING LEGAL ISSUE OF DEMONSTRATED PUBLIC IMPORTANCE SUFFICIENT TO WARRANT FURTHER INTERPRETATION OF THE FIRST AMENDMENT BY THIS COURT.

The questions presented are of little more than academic or episodic interest. The electronic technology which has recently been applied to video games, to pinball games, and indeed to other more traditional board games such as Monopoly,[3] is

---

[3] See item in Boston Globe, (Sept. 9, 1983, p. 19) describing public introduction of electronic version of Monopoly.

changing so rapidly that games of the type presently operated by appellants may have disappeared from use by the time this Court issues its mandate.

Further, the end of the recent surge of popularity of coin-activated games has been widely reported in the press, as have the sales and profit declines of the major video game manufacturers. So video games may already be a form of electronic dodo bird.

Therefore, even if the Court were inclined someday to grant plenary review to the questions raised by appellants, such review at this point is clearly premature. "Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-918 (1950) (Frankfurter, J.)

## III. A Reversal of the Decision of the Massachusetts Court on First Amendment Grounds would Create the Right to Play Trivial Arcade Games as One of the Cornerstone Freedoms of our Society.

Such a decision would not only degrade the First Amendment, it would surely start a torrent of litigation on the question of which kinds of automatic amusement games were protected, which were not, and the nature of the protection accorded to each.

## IV. The Legal Issues Presented for Review in the Four Zoning Cases are Cloudy and Imprecise.

Because the Massachusetts court affirmed the judgments in the zoning cases without opinion, and since all appellants operate coin-activated games only as accessory uses (31a-34a, *infra*), it is not clear whether the Zoning Bylaw was construed

by the court as prohibiting all commercial operation of coin-activated amusement devices, or only such operation as an accessory use. Therefore, in order to review the zoning cases this Court would be faced with the necessity of interpreting the meaning of a state statute through the process it has referred to as "extrapolation" and described as a difficult and delicate task. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972).

## V. The Decision of the Supreme Judicial Court on the Federal Constitutional Questions Raised by Appellants is Clearly Correct.

The cases decided by this Court involving challenges to statutes based on alleged infringement of the constitutional guarantee of free speech may be grouped into two categories.

(a) those cases where the challenged statute regulates activities involving a commonly recognized vehicle of communication, *e.g.*, *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (television broadcast of human cannonball act as part of news shows); *California* v. *La Rue*, 409 U.S. 109 (1972) (dancing); *Schacht* v. *United States*, 398 U.S. 58 (1970) (live outdoor theatrical performance intended to protest government policy); *Red Lion Broadcasting* v. *F.C.C.*, 395 U.S. 367 (1969) (radio broadcasting); *Joseph Brustyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952) (motion picture); *Winters* v. *New York*, 333 U.S. 507 (1948) (printed newspapers, magazines, pamphlets); and

(b) those cases where the regulated activities do not involve recognized generic forms of expression, *e.g.*, *Spence* v. *Washington*, 418 U.S. 405 (1974) (public display of flag with peace symbol); *Cohen* v. *California*, 403 U.S. 15 (1971) (wearing jacket with obscenity printed on the back in public, as protest against the draft); *Street* v. *New York*, 394 U.S. 576 (1969)

(public flag burning to protest assassination of Martin Luther King); *United States* v. *O'Brien*, 391 U.S. 367 (1968) (public draft card burning to protest Vietnam War); *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1968) (wearing black armband at school to protest Vietnam War); *Cox* v. *State of Louisiana*, 379 U.S. 536 (1965) (street marches).

Where a commonly recognized vehicle of communication is involved this Court has established a kind of prophylactic protective rule whereby it does not inquire into the content, amount, or purpose of the communicative activity prior to affording First Amendment protection.

In the case of all other activities the Court makes a further inquiry into the facts and circumstances before affording First Amendment protection and in order to decide the extent of such protection. This inquiry involves such things as, the amount of pure speech as opposed to action involved in the regulated activity, whether the activity is intended by the actor, or perceived by an audience, as communication, the nature of the ideas or opinions communicated viewed in the context of the central purposes of the First Amendment, and whether the challenged regulation involves an attempt by government to standardize opinions and ideas. *Roth* v. *United States*, 354 U.S. 476, 484 (1957); *Cohen* v. *California*, *supra*; *Cox* v. *Louisiana*, *supra*; *United States* v. *O'Brien*, *supra* and *Spence* v. *Washington*, *supra*. See generally L. Tribe, American Constitutional Law 576-579 (1978); T. Emerson, The System of Freedom of Expression 80 (1970).

As the cited cases show, appellants' argument that video games are entitled to First Amendment protection merely by virtue of being a form of entertainment cannot survive analysis. Entertainment is presumptively entitled to such protection only where it is presented by means of a commonly recognized vehicle of communication, such as motion pictures, tele-

vision, plays, or dance. This is clearly the meaning of the *Schad* case relied on so heavily by appellants.[4]

Where it is not so presented, entertainment must meet the same standards of communicative intent or effect as any other activity which involves conduct. For example, many persons consider cock fights to be entertainment, but it could hardly be argued that cock fighting is protected by the First Amendment.

Since it cannot be sincerely argued that the coin-activated video game is a commonly recognized communications medium, the Court should take the next step of inquiring into the nature and extent of communicative activity involved in video game playing, and the censorial or noncensorial nature of the attempted governmental regulation.

The factual record in this case is contained in an agreed statement of facts filed in the trial court (31a-47a, *infra*). One searches there in vain to find evidence of any intent to communicate opinions or ideas by the designers, manufacturers or purveyors of video games; neither is there any evidence that video game players perceive themselves as receiving any such communication. In fact the only communication which the record shows occurring is that which is necessary to effect a simple commercial transaction, namely the renting of play time on an automatic amusement device. This is not a sufficient basis on which to invoke the First Amendment.[5]

Neither are appellants' hyperbolic and extravagant descriptions of video games and game playing, couched in theatrical metaphor, adequate to compensate for these insufficiencies in the record. By analogizing video games to "stories," "motion pictures," "improvisational theater" or "morality plays"[6] the

---

[4] See cases cited by the court in *Schad* v. *Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981).

[5] *Village of Hoffman Estates* v. *Flipside*, 455 U.S. 489, 497 n.9 (1982).

[6] Jurisdictional Statement, pp. 5, 12, 13-14.

appellants are attempting to remedy their failure to present any evidence of communicative activity. They are in effect asking this Court to make a declaration that video games are a recognized generic form of communications media presumptively entitled to First Amendment protection. Yet appellants adduce no evidence in support of such a declaration, and it is hardly a proposition so commonly agreed upon as to be a matter of judicial notice.

As to the question of any content-based governmental activity, no such claim has ever been made by appellants, nor could it be. The bylaws regulate all forms of coin-activated amusement devices equally without regard to content.

Appellants also claim that General Bylaw No. 48 is facially invalid "because it purports to ban other forms of expression that have been held to be protected."[7] These prohibited forms of expression are claimed to be coin-activated movie machines and "almost every imaginable mechanical or electronic medium . . . for expressive entertainment."[8] The first answer to this claim is that the Supreme Judicial Court construed the bylaw to be a "prohibition . . . of the commercial operation of coin-activated amusement devices" (1a, 5a, *infra*). Further, contrary to appellants' assertion, the Massachusetts court did not explicitly hold that the bylaw prohibited coin-operated movies. The court said: "Their [appellants'] only possible claim of deterrence is that persons desiring to engage in the operation of coin-activated movies may refrain from doing so. . ." (9a, *infra*). It later referred to this as a "potential prohibition" (10a, *infra*). In any case it held that the possible prohibition of coin-activated movie machines does not constitute

---

[7] Jurisdictional statement at 17-18. It is not clear whether appellants challenge the Zoning Bylaw on this ground. Coin-operated movies appear to be allowed as a principal use (no. 20). See table, *supra*.

[8] *Id.* at 18.

a showing of "real and substantial" overbreadth as defined by this Court in *Broaderick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). This holding was manifestly correct.[9]

Since, as demonstrated above, the only rights affected by the Marshfield bylaws are property rights, and not First Amendment liberty rights, appellants' due process and equal protection claims need not detain the Court for long. Legislative enactments begin with a presumption of validity difficult to overcome. *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Ginsberg* v. *New York*, 390 U.S. 629, 642 (1968). Legislation will not be set aside if any state of facts may reasonably be conceived to justify it. *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1981).

Appellants face a similar burden in attempting to overcome the presumption of validity attaching to the legislative classification of commercially operated coin-activated amusements as a separate sub-group within the broad category of games of skill, and its regulation of those games but no others. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it" (citations omitted). *Dandridge* v. *Williams*, *supra*, 397 U.S. at 484.

In support of its by-laws, the town offered, *inter alia*, evidence from a retired undercover narcotics officer, who had for years frequented pinball and video arcades in the course of

---

[9] *Id.* at 17. Appellants also suggest that because video games have been held to be entitled to copyright protection they should be entitled to First Amendment protection. Following this reasoning copyrightable items such as jewelry, glassware, stuffed animals, dress and fabric designs, model airplanes and playing cards would also be protected by the First Amendment. See, *e.g.*, *Dollcraft Industries, Ltd.* v. *Wellmade Toy Mfg. Co.*, 201 U.S. P.Q. 708 (E.D. N.Y. 1978); *Monogram Models, Inc.* v. *Industro Motive Corp.*, 492 F.2d 1281, *cert. denied*, 419 U.S. 843 (1974), Annotation, 26 A.L.R. Fed. 408-420.

his duties, as to what he had observed in such establishments. It also offered testimony from its police chief as to crowd control problems caused by businesses which attract large numbers of young people. The appellants offered an affidavit of one B. David Brooks, an alleged "expert" on juvenile crime.[10]

It seems clear that reasonable minds may differ on the social harm caused by the commercial operation of coin-activated amusement games.[11] The legislative body in our case has determined that the prohibited use cannot be had without injury to others and the trial court has found that this is a question upon which reasonable minds may differ, and for that reason the question is concluded by the legislative determination. *Consolidated Rock Products Co.* v. *City of Los Angeles*, 57 Cal. 2d 515, 522, appeal dismissed, 371 U.S. 36 (1962).

## Conclusion.

The appeal should be dismissed.

Respectfully submitted,

ROBERT L. MARZELLI,
BILLINGHAM & MARZELLI,
95 Church Street,
North Pembroke, Massachusetts 02358.
(617) 826-8411

---

[10] In addition to filing an affidavit in this Massachusetts case, Mr. Brooks has testified on behalf of the coin machine industry in at least one other case (*Oltman* v. *City of Palos Hills*, (No. 82, c. 3568, Circuit Court of Cook County, Ill. (1982)), and has contributed to the industry trade journal, see Brooks, Exploring the Arcade Myths, Electronic Games, Aug. 1982, p. 35.

[11] See speech by United States Surgeon General, C.E. Kopp, University of Pittsburgh, Nov. 9, 1982, stating that such games may be hazardous to young people. Also, *Alladin's Castle, Inc.* v. *Village of North Riverside*, 66 Ill. App. 3d 542 (1978) (where two psychologists testified on opposite sides of the issue).

## Supplemental Appendix.


Appendix A
Opinion of the Supreme Judicial Court (June 13, 1983 1a

Appendix B
Memorandum of decision rulings and orders for judgment (Mass. Super. Nov. 8, 1982) 15a

Appendix C
Judgment of the Supreme Judicial Court 19a

Appendix D
Judgments of the Superior Court 20a

Appendix E
Order of the Superior Court 30a

Appendix F
Statement of agreed facts 31a

# MARSHFIELD FAMILY SKATELAND, INC. & others[1] *vs.* TOWN OF MARSHFIELD (and five consolidated cases[2]).

Plymouth. February 10, 1983. — June 13, 1983.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, & LYNCH, JJ.

*Municipal Corporations*, By-laws and ordinances. *Constitutional Law*, Police power, Freedon of speech and press, Home rule, Equal protection of laws. *Due Process of Law*, Regulation of economic activity. *Public Entertainment. Video Games.*

In determining whether a town by-law prohibiting the operation of certain amusement devices within the town was invalid by reason of inconsistency with provisions of State law allowing municipalities to license such devices, a court was to make every presumption in favor of the by-law's validity. [ ]

Provisions of G. L. c. 140, § 177A, permitting local licensing boards to issue licenses for certain coin operated amusement devices did not foreclose a town from adopting a by-law banning, with certain exceptions, the operation within the town of "any mechanical or electronic automatic amusement device." [ ]

A town by-law prohibiting, with certain exceptions, the operation within the town of "any mechanical or electronic automatic amusement device" did not, as applied to video game entertainment, infringe upon any right of free expression guaranteed under the Federal or State Constitution. [ ]

Commercial operators of video game equipment in a town could not successfully invoke the overbreadth doctrine to challenge the constitutionality of a town by-law prohibiting, with certain exceptions, the operation of "any mechanical or electronic automatic amusement

[1] The other plaintiffs are Thomas F. Vetra; Ocean Street Canteen, Inc.; John D. Gunn; Bonnie Parkers, Inc.; Venus II, Inc.; H. & M. Enterprises, Inc.; B.P. Productions, Inc.; Marshfield Sports Center, Inc. The plaintiffs are businesses and businessmen in the town of Marshfield.

[2] The cases were consolidated for trial with the case at bar; they were instituted by the building inspector of the town against the various plaintiff merchants named herein.

device," where the possibility that the by-law might be applied to prohibit coin operated movie machines did not constitute either substantial overbreadth or a significant deterrent to the exercise of constitutionality protected freedom of expression. [ ]

The record in an action by commercial operators of video game equipment in a town, challenging the constitutionality of the town's by-law which prohibited, with certain exceptions, the operation of "any mechanical or electronic automatic amusement device," showed the existence of a reasonable relation between the by-law and a permissible object of the police power, and thus the plaintiffs demonstrated no violation of their right to due process of law. [ ]

A town by-law prohibiting, with certain exceptions, the operation within the town of "any automatic or electronic amusement device" did not create a classification violative of equal protection principles, where the town had a rational basis for adopting the by-law. [ ]

CIVIL ACTIONS commenced in the Superior Court Department on August 12, and August 16, September 1, and October 6, 1982.

The cases were consolidated for trial and were heard by *Ford*, J.

The Supreme Judicial Court granted a request for direct appellate review.

*Ira H. Zaleznik* (*Barry E. Rosenthal* with him) for Marshfield Family Skateland, Inc. & others.

*Robert L. Marzelli*, Town Counsel, for the town of Marshfield.

HENNESSEY, C.J. This case involves the validity of a total prohibition by the town of Marshfield of the commercial operation of coin-activated amusement devices. In November, 1981, responding to a request for an opinion, town counsel for Marshfield advised the board of selectmen for Marshfield that the town zoning by-law, adopted in 1972, prohibited the commercial operation of coin-activated amusement devices in every zoning district of the town, as either a principal or accessory use. The board thereupon ceased issuing or renewing licenses for coin-activated amusement devices. This policy was adopted pending presentation at the 1982 annual town meeting of an amendment to the zoning by-law that would allow the

operation of these devices in certain business zones, and a new by-law that would provide for licensing of the devices.

At the annual town meeting in June, 1982, however, the voters defeated the proposals and adopted instead an alternative amendment, General By-Law No. 48 (art. 57 of the town meeting warrant) expressly prohibiting the operation of "any mechanical or electronic amusement device, whether coin-operated or not," with certain exceptions.[3] General By-Law No. 48 was then submitted to the Attorney General for his approval pursuant to G. L. c. 40, § 32.

After passage of General By-Law No. 48, but before its approval by the Attorney General, the building inspector for the town of Marshfield commenced enforcement of the zoning by-law adopted in 1972, by sending violation notices to all persons operating coin-operated amusement devices, ordering them to cease such use of their property. The plaintiff merchants refused to cease operating the amusement devices and in August, 1982, the building inspector instituted court proceedings against them.

On September 30, 1982, the Attorney General approved General By-Law No. 48. The plaintiff merchants then commenced this action in Superior Court seeking a declaration that General By-Law No. 48 is invalid. They also applied for a preliminary injunction against the town to prevent it from enforcing General By-Law No. 48. After a hearing, the trial judge denied injunctive relief to the plaintiffs and they, then, filed a petition for relief with a single justice of the Appeals Court under G. L. c. 231, § 118. The town agreed not to undertake any enforcement proceedings

[3]General By-Law No. 48, provides as follows: "1. No person shall keep or cause to be kept, operate or suffer to be operated, on premises owned or leased by him, or subject to his control, any mechanical or electronic automatic amusement device, whether coin-operated or not (as defined under, but not limited to, Chapter 140, Section 177A(2) of the Massachusetts General Laws) except private in-home use, coin-operated juke boxes, pool, billiard, bowling and athletic training devices. 2. Any person found violating the provisions of this bylaw will be punished by a fine of $200 for each offense."

pending the single justice's decision and the single justice ordered the parties to seek a speedy hearing in the Superior Court.[4]

In order to expedite proceedings in the Superior Court, the parties presented a statement of agreed facts. Also by agreement, the merchants developed and submitted a videotape demonstration of parts of the audio visual work of five different video games, along with a written explanation of the videotape. The Superior Court judge held a hearing on these matters. Subsequently, he issued memorandum of decision applicable to all six cases in which he declined to invalidate the Marshfield by-law. Judgments were entered in all the cases. The merchants then filed their notices of appeal to the Appeals Court, and all actions were consolidated on appeal by order of a single justice of that court. We granted the plaintiffs' application for direct appellate review.

On appeal the merchants attack the validity of both General By-Law No. 48 and the provisions of the zoning by-law adopted in 1972. With regard to General By-Law No. 48, they contend that the total prohibition of coin-operated amusement devices is invalid because it (1) is inconsistent with State law, (2) violates fundamental rights of free expression guaranteed under the First Amendment to the United States Constitution, and arts. 16 and 19 of the Massachusetts Declaration of Rights, and (3) denies the merchants due process and equal protection of the laws under both the State and Federal Constitutions. With regard to the zoning by-law adopted in 1972, the merchants argue that the by-law, properly interpreted, does not prohibit the operation of coin-activated amusement devices either as part of the merchants' principal uses or as accessory uses. They further contend that, if the 1972 zoning by-law is in-

[4]The town's stipulation not to enforce both by-laws was superseded by the single justice's subsequent allowance of the merchants' request for stays and injunctive relief pending appeal. Thus, the merchants have been able to continue operation of their amusement devices during the pendency of these proceedings.

terpreted to preclude operation of coin-operated amusement devices, the by-law is invalid for the same reasons that General By-Law No. 48 is invalid. We conclude that General By-Law No. 48 is a proper exercise of the town of Marshfield's police power and we reject all the merchants' arguments as to its invalidity. Since we uphold the express prohibition of coin-activated amusement devices under General By-Law No. 48, we need not address the issues raised with regard to the more general provisions of the 1972 zoning by-law.

1. The merchants' first contention is that General By-Law No. 48 is invalid because it is inconsistent with State law. They assert initially that where, as here, a by-law results in a total ban of a particular activity, we should shift the burden of justifying the exclusion to the municipality. See e.g., *Beaver Gasoline Co.* v. *Osborn Borough*, 445 Pa. 571, 576-577 (1971). We do not follow this so called "Pennsylvania rule," see *Lambros, Inc.* v. *Ocean Ridge*, 302 So.2d 993, 994 (Fla. App. 1981), but rather we adhere to the view that every presumption will be made in favor of the validity of a by-law or ordinance. See, e.g., *Shell Oil Co.* v. *Revere*, Mass. Adv. Sh. (1981) 1285, 1289 (considering a city ordinance banning self-service gasoline stations); *John Donnelly & Sons* v. *Outdoor Advertising Bd.*, 369 Mass. 206, 216 (1975) (considering by-law in effect prohibiting billboards even in business districts).

Applying this standard of review, we examine the validity of General By-Law No. 48. Under § 6 of art. 89, the Home Rule Amendment, and § 13 of G. L. c. 43B, the Home Rule Procedures Act, communities may enact legislation to advance the common good so long as it is not inconsistent with State law. See *Bloom* v. *Worcester*, 363 Mass. 136, 145, 149 (1973). In *Bloom*, we resolved that in determining whether a local ordinance or by-law is "not inconsistent" with any general law for puposes of the Home Rule provisions, we would follow "the same process of ascertaining legislative intent . . . as has been performed in the Federal preemption cases and in our own cases involving 'inconsistent' or

'repugnant' local ordinances or by-laws." *Id.* at 155. Under this approach, we emphasized, "[t]he legislative intent to preclude local action must be clear" (footnote omitted). *Id.* We noted that there where State laws on a particular subject are comprehensive or where the Legislature has explicitly limited the manner in which cities and towns may act on a subject, a locality's right to act on that subject may be preempted. *Id.* A local by-law may also be deemed inconsistent where it prevents a legislative purpose from being achieved. *Id.*

In this case, the merchants urge that the local by-law's prohibition of the keeping and use of coin-activated, mechanical, and electronic amusement devices conflicts with G. L. c. 140, § 177A, the statutory provision which allows municipalities to license "automatic amusement device[s]" as defined in that section. Under General By-Law No. 48 a "mechanical or electronic automatic amusement device" is defined as including but not limited to the devices defined under G. L. c. 140, § 177A. The merchants claim that the by-law is inconsistent with G. L. c. 140, § 177A, because it prevents the achievement of the legislative purpose behind G. L. c. 140, § 177A. We disagree. Prior to the enactment of § 177A, we held in *Commonwealth* v. *Rivers*, 323 Mass. 379, 383 (1948), that "free play" pinball machines and similar devices were illegal lotteries under G. L. c. 271, § 7. Section 177A was enacted shortly after our decision in *Rivers* "for the purpose of permitting the use and maintenence of automatic amusement devices such as pinball machines, including 'free play' pinball machines, if duly licensed and if used for amusement only." *Commonwealth* v. *Macomber*, 333 Mass. 298, 301 (1955). Thus, one purpose of § 177A was clearly to remove coin-activated amusement devices from the ambit of the gambling laws and to *allow* localities to license these games. General By-Law No. 48 does not prevent this purpose from being achieved.

The merchants contend, however, that in enacting § 177A, the Legislature did not intend to allow local com-

munities to ban all automatic amusement devices. They rely heavily on our decision in *Turnpike Amusement Park, Inc.* v. *Licensing Comm'n of Cambridge*, 343 Mass. 435, 438 (1962), where we determined that G. L. c. 140, § 177A, does not give local licensing authorities the power to impose an over-all ban on automatic amusement devices. Our reasoning in *Turnpike Amusement Park, Inc.*, however, is not controlling in the case at bar. The power of a local licensing board to issue licenses under G. L. c. 140, § 177A, is created and defined entirely by the provisions of G. L. c. 140, § 177A. Hence, a licensing board, although it may exercise its broad grant of discretion under the statute to grant or to deny licenses, may not go beyond that statutory grant and adopt a broad policy of denying all licenses. In contrast, local communities, through their by-laws, may supplement the statutory provisions so long as their by-laws are not inconsistent with any State law. See *John Donnelly & Sons*, *supra* at 214, and cases cited. Hence, the town of Marshfield may do what the licensing board may not do — namely, determine that it will not allow any licenses to be issued. It is clear that in some areas of activity legal business activities regulated by State law may be prohibited by local by-laws. *John Donnelly & Sons*, *supra* at 214, 222. Section 177A does not reveal any intent by the Legislature to vary this rule. Rather, § 177A reveals only the Legislature's intent to convert the operation of "free play" coin-activated amusement devices from the status of illegal lotteries under the *Rivers* decision to that of legal, regulated activities permitted but not required to operate in a community.

2. The merchants next submit that General By-Law No. 48 is unconstitutional because it infringes on fundamental rights of freedom of expression guaranteed under both the State and Federal Constitutions. They contend that the by-law is facially invalid because it suppresses both video game entertainment, which they seek to present to the public and which they claim is protected expression, as well as other forms of protected expression. We first address the mer-

chants' contention with regard to video game entertainment.

In *Caswell* v. *Licensing Comm'n for Brockton*, 387 Mass. 846, 867-871 (1983), we confronted a similar claim by the plaintiff Caswell that video game entertainment is a form of expression entitled to constitutional protection. We explained that, although entertainment may be entitled to First Amendment protection, "to gain protected status, that entertainment must be designed to communicate or express some idea or some information." *Id.* at 868. On the record before us in *Caswell*, we concluded that Caswell had not demonstrated successfully that video games import sufficient communicative, expressive, or informative elements to constitute protected expression under either the State or Federal Constitution. We stated: "From the record before us, it appears that any communication or expression of ideas that occurs during the playing of a video game is purely inconsequential. Caswell has succeeded in establishing only that video games are more technologically advanced games than pinball or chess. That technological advancement alone, however, does not impart First Amendment status to what is otherwise an unprotected game." *Id.* at 871. We adhere to our reasoning and holding in *Caswell* in the case at bar. The merchants in this case, in an attempt to demonstrate that video games contain sufficient communicative elements to be entitled to constitutional protection, prepared a videotape demonstration of parts of the audio visual work of five different video games,[5] together with a written explanation of the videotape. The videotape and explanation, however, do not demonstrate any more communicative aspects of these video games than were demonstrated by the plaintiff in *Caswell*. We recognize that in the future video games which contain sufficient communicative and expressive elements may be created. We are not prepared in this case, however, to hold that these

[5]The five different video games were: "Ms. Pac-Man," "Tron," "Donkey Kong," "Zaxxon," and "Kangaroo."

video games, which are, in essence, only technologically advanced pinball machines, are entitled to constitutional protection.

The merchants further submit that even if the video game entertainment which they seek to present is not protected expression, General By-Law No. 48 is, nevertheless, void under the overbreadth doctrine because it prohibits many forms of expression. They argue, that on its face, the Marshfield by-law would prohibit the operation of coin-activated movie machines, i.e., peep shows, which "are fully protected by the First Amendment." *Fantasy Book Shop, Inc.* v. *Boston*, 652 F.2d 1115, 1124 n.12 (1st Cir. 1981). The merchants, thus, contend that we should invalidate Marshfield's General By-Law No. 48.

We conclude, however, that the merchants may not rely upon the doctrine of overbreadth in this case. In *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973), the Court acknowledged that the general rule is that a person to whom a statute may be applied constitutionally will not be allowed to challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. The Court explained that since "the First Amendment needs breathing space . . . [l]itigants . . . are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 611-612. The Court admonished, however, that because the overbreadth standing doctrine is "manifestly, strong medicine," the Court has employed it sparingly. *Id.* at 613. In *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976), quoting *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975), the Court further explained that, if a statute's deterrent effect on protected expression is not "both real and substantial" and if the statute is "readily subject to a narrowing construction," the doctrine of overbreadth may not be employed.

In this case, the merchants have not demonstrated either substantial overbreadth or substantial deterrent effect. Their only possible claim of deterrence is that persons desiring to engage in the operation of coin-activated movies in Marshfield may refrain from doing so out of fear that the Marshfield by-law might be applied to prohibit their actions. The merchants, however, have shown that the by-law would bar only one form of protected expression — coin-activated movies. This potential prohibition of one form of entertainment is not substantial overbreadth. Contrast *Shad* v. *Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981) (ordinance prohibited all forms of live entertainment). Moreover, it appears unlikely that potential operators of coin-activated movies would be chilled from applying for a license because of the existence of General By-Law No. 48. Rather, they would probably be as willing to apply for a license as are the merchants in this case and, if denied a license on the basis of the by-law, to litigate its constitutionality. For these reasons, we conclude that the merchants may not rely on the overbreadth doctrine to invalidate a by-law which may be applied constitutionally to their own activities. See *Young*, *supra* at 60-61; *Broadrick*, *supra* at 615-618; *Aristocratic Restaurant of Massachusetts, Inc.* v. *Alcoholic Beverages Control Comm'n (No. 1)*, 374 Mass. 547, 555-557, appeal dismissed, 439 U.S. 803 (1978).

3. The merchants' final contention is that the Marshfield by-law violates the due process and equal protection guarantees of both the State and Federal Constitutions. We note that "the right . . . to pursue one's business" has never been considered to be a fundamental right warranting strict judicial scrutiny. *Commonwealth* v. *Henry's Drywall Co.*, 366 Mass. 539, 542 (1974), and cases cited. We also emphasize that, as we have determined, this case does not involve protected rights of freedom of expression. Accordingly, since no fundamental rights are involved, the validity of the Marshfield by-law must be judged by the lowest level of scrutiny, the rational basis test. See *Orleans* v. *Dukes*, 427, U.S. 297, 303 (1976); *Zayre Corp.* v. *Attorney Gen.*, 372

Mass. 423, 433 (1977). Under the rational basis test, "the person making the challenge has an onerous burden of proof in establishing the invalidity of the statute." *Commonwealth* v. *Henry's Drywall Co.*, *supra* at 541. In applying the rational basis standard, we have stated that "[i]f a statute or ordinance serves a legitimate purpose, and if the means of the State adopted are rationally related to the achievement of that purpose, the legislation will withstand constitutional challenge" (footnote omitted). *Shell Oil Co.* v. *Revere*, Mass. Adv. Sh. (1981) 1285, 1289. We have further explained that "a statutory classification will not be set aside as a denial of equal protection or due process if any state of facts reasonably may be conceived to justify it." *Henry's Drywall Co.*, *supra*. The plaintiffs claim that the Marshfield by-law violates their rights to due process and equal protection because it is not rationally related to permissible legislative objectives and because the singling out of commercially operated amusement devices is an irrational classification. We disagree.

With regard to the plaintiffs' due process challenge, we conclude that the by-law does bear a "reasonable relation to a permissible objective of the police power." *John Donnelly & Sons* v. *Outdoor Advertising Bd.*, 369 Mass. 206, 216 (1975). The right to pursue trade or business "is not unqualified and, in certain circumstances, must yield to regulations designed to promote the public safety, health, morals and general welfare. Our function is to ensure that no regulation unreasonably interferes with the pursuit of a trade or business. It is not our function to consider the expediency of an enactment or the wisdom of its provisions" (citations omitted). *Henry's Drywall Co.*, *supra* at 544. In this case, Marshfield has chosen to prohibit completely the commercial operation of coin-operated amusement devices rather than to regulate certain aspects of their operation. It is well established that "even a legitimate occupation may be restricted or prohibited in the public interest." *Breard* v. *Alexandria*, 341 U.S. 622, 632-633 (1951). *John Donnelly & Sons*, *supra* at 222. The issue is whether there is a ra-

tional basis for the prohibition. *Breard, supra.* A town's possible purposes in adopting an ordinance like the instant one may include a number of permissible objectives. For example, it would be reasonable for a town to prohibit the commercial operation of these games to further the legitimate objectives of decreasing noise, traffic, and congestion in the area of the businesses operating the games. Indeed, the record submitted in this case demonstrates that the operation of these games contributes to such problems. From the offer of proof of Marshfield and an affidavit of a retired police officer of Marshfield, it appears that Marshfield is a resort community located on the coast; that a substantial proportion of the influx of summer residents to Marshfield each year are single males under twenty-one years of age; that the Marshfield police department has to increase police patrols in the beach areas during the summer season to maintain order; that any business which causes concentration of young people, particularly in the beach areas in the summer, increases the potential for disorderly conduct as well as the burden on the police department; and that automatic amusement devices do attract as patrons large numbers of young people. Although the by-law in this case might have been drawn more narrowly, for example, to prohibit the operation of these games during only the summer season, we emphasize that "[a] statute or ordinance is not rendered unconstitutional merely because the evidence of record suggests that the 'ultimate efficacy' of achieving the statutory purpose is in question, or that the means to achieve the statutory end is rough, illogical or not the best available, or that the means stated in the statutes is not perfectly consistent with the desired result" (footnotes omitted). *Shell Oil Co., supra* at 1290. "[L]egislative bodies 'are not required to convince the courts of the correctness of their legislative judgments.'" *Shell Oil Co., supra* at 1291-1292, quoting *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

The merchants' equal protection argument also fails under the rational basis test. The equal protection guaran-

tee requires us to examine whether the classification chosen by the town of Marshfield rationally furthers a legitimate State interest. *Shell Oil Co., supra* at 1293. The merchants urge that the by-law is invalid because, even if Marshfield has a legitimate interest to regulate, the classification, nevertheless, is improper because the State's interest in regulating commercially operated automatic amusement devices is no different from the State's interest in regulating billiards, bowling, home video games, juke boxes, golf, baseball, and other forms of recreation and amusement. We conclude, however, that it was for the town to determine whether commercially-operated automatic amusement devices pose any greater or different threats to the safety and order of its community than do these other forms of amusement. "Once the Legislature has drawn a classification, 'neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.'" *Shell Oil Co., supra* at 1291, quoting *United States* v. *Carolene Prods. Co.* 304 U.S. 144, 154 (1938).[6] The rationale for this respect for legislative decision making is borne out by the fact that the court in no instance could possibly have before it all of the knowledge and considerations which might have impelled those who voted for the by-law, particularly as that knowledge bore on the legitimate concerns related to the police power. On the record before us, we conclude that the basis for the classification is not "more fanciful than real." *Coffee-Rich, Inc.* v. *Commissioner of Pub. Health*, 348 Mass. 414, 425 (1965). Nor do we conclude that the classification is arbitrary or irrational. *See Henry's Drywall Co., supra* at 545. Therefore,

[6]The merchants rely on several cases from other jurisdictions where courts invalidated certain bans on the playing of pinball machines on the ground that the bans violated the equal protection clause. *Cossack* v. *Los Angeles*, 11 Cal.3d 726, 734-735 (1974). *State* v. *Bloss*, 613 P.2d 354 (Hawaii 1980). *People* v. *Palazzolo*, 62 Mich. App. 140, 146-147 (1975). We point out, however, that in *Cossack* and *Bloss*, the courts considered prohibitions by municipalities of some coin-operated amusement games and not others and, therefore, the reasoning of those courts is inapposite. Furthermore, we decline to follow the reasoning of the court in *Palazzolo*.

we do not invalidate it. Accordingly, we reject the merchants' arguments based on both equal protection and due process, and we uphold the validity of General By-Law No. 48.

*Judgments affirmed.*

## APPENDIX B

186

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court Department
Of The Trial Court
Ford, J.
November 8, 1982

George Dobson vs. John D. Gunn
CA82-15,569
George Dobson vs. Thomas F. Vetra
CA82-15,593
George Dobson vs. Ocean Street Canteen, Inc.
CA82-15,596
George Dobson vs. G.P. Productions, Inc., d/b/a
CA82-15,597
George Dobson vs. Bonnie Parkers, Inc., et als.
CA82-15,685
Marshfield Family Skateland, Inc., et als.
vs. Town of Marshfield
CA82-15,864

### MEMORANDUM OF DECISION RULINGS AND ORDERS FOR JUDGMENT

1. In 15,864, plaintiffs Marshfield Family Skateland, Inc., et al., (Merchants) in the Town of Marshfield (Town) seek injunctive and declaratory relief with respect to the barring of video games and like coin-activated amusement games. Such barring results from Article 57, adopted by the Town on June 15, 1982 and approved by the Attorney General on September 30, 1982. The parties refer to this Article as General By-Law 48.

2. Consolidated for trial are the other five actions brought by the Town's Building Inspector, George Dobson (Dobson) against various merchants (Merchants) to enjoin the operation of coin-activated amusement games, including video games, on their premises. It is alleged this is not an accessory use, but is a prohibited use under the Town's Zoning By-Law. The record consists of an agreed statement of facts.

3. The Court has declined to hear testimony offered by all parties as to the desirability, or each lack of desirability, of the Article and By-Law in question, *Comm.* v. *Reis*, 355 Mass. 189 (1969).

4. Accordingly, it is unnecessary for the Court to make findings of fact. No facts are in dispute.

5. Coin-operated amusement machines have had a troubled history in the nation and in this Commonwealth. They are closely regulated for obviously public policy reasons. Their control has spawned a welter of litigation everywhere.

6. The decided cases are in disarray as to the power of the public to control these devices. See, for example, *Turnpike Amusement Park, Inc.* v. *Cambridge*, 343 Mass. 435 (1962) (decided *before* the Home Rule Amendment) where the Court declared invalid the barring of all pinball machines. Compare with the recent Federal case of *Rothner* v. *City of Des Plaines*, U.S.D.C. (DC No Dist. Ill.) No. 81C2669 Slip Opinion Sept. 11, 1981 upholding a "Home Rule" barring of electronic games.

7. The Home Rule Amendment (Mass. Const. Amendment L XXXIX (Mass. Annot. Laws, Sec. 235, p. 521) was adopted in 1966. It, inter alia, empowers a Town to enact a broad range of local laws (see sec. 6 & 7). A Town can, with certain qualifications,

". . . . adopt by-laws . . . (and) exercise any power or function which the general court has power to confer on it . . . . which (are) not inconsistent with . . . laws enacted by the general court . . . ."

8. I rule the Zoning By-Law is valid. I rule that the use of these games is not an accessory use as set forth in the Zoning By-Law. The Town shall prevail in the zoning cases. I rule all issues raised in the courter-claims are resolved in favor of the Town and against Merchants.

9. The Inhabitants of the Town of Marshfield, after due deliberation, enacted Article 57, the video game by-law, barring such games. They perceived, as a public policy matter, that the interdicted games were inimical to the public good and the public order.

10. While the matter is not free from doubt, the court is not persuaded that the video game by-law is unconstitutional or in excess of the powers granted to the Town by the Home Rule Amendment or by the General Court. It is noted that Attorney General Bellotti, after careful review, reached the same conclusion and approved the by-law in issue.

11. Moreover, the more usual and appropriate procedure is to raise these issues in the normal course of criminal trials in which these, the Merchants, may become defendants.

12. Moreover, and in any event, the Court chooses to follow the normal judicial policy, absent compelling reasons not present here, to be slow to declare unconstitutional the acts of other branches of government. Trial courts traditionally defer to appellate courts in these matters. The Appeals Court, or the Supreme Judicial Court, as the case may be, can resolve these issues after extensive briefings, hearings, reflection and deliberation. This will guarantee due and

proper regard for the doctrine of separation of powers of our state government.

13. I rule Article 57 is valid.

14. Dobson and the Town are to have judgment in their favor. The Merchants are to have judgments against them on their counterclaims.

## ORDERS FOR JUDGMENT

15. Judgment are to be entered in accordance with the foregoing.

*/s/ Joseph Ford*
JOSEPH FORD
Justice of The Superior Court

Entered: November 8, 1982

## APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court for the Commonwealth,

At Boston, June 13, 1983.

In the case No. SJC-3043

MARSHFIELD FAMILY SKATELAND, INC. & others

vs.

TOWN OF MARSHFIELD
(and five consolidated cases)

pending in the Superior Court Department of the Trial Court for the County of Plymouth No. 82-15864, 82-15596, 82-15597, 82-15593, 82-15685, 82-15569

ORDERED, that the following entry be made in the docket; viz., — Judgments affirmed.

By the Court,
Patrick J. Hurley, Clerk.

June 13, 1983

See opinion on file.

## APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss. Superior Court Department
of the Trial Court
Civil Action
No. 82-15864
Ford, J.
11-8-82

MARSHFIELD FAMILY SKATELAND, INC.
ET ALS.
Plaintiffs,

vs.

TOWN OF MARSHFIELD,
Defendant

### JUDGMENT

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

1. Article 57 adopted June 15, 1982 by the Town of Marshfield, (and now known as General By-Law No. 48), and approved by the Attorney General on September 30, 1982, is a valid exercise of the power granted to the Town under the Home Rule Amendment to the Constitution of the Commonwealth of Massachusetts.

2. Article 57 is not in conflict with any statute of the Commonwealth of Massachusetts.

3. Article 57 does not violate any right to free speech, due process of law, and equal protection of the laws as guaranteed

by the First and Fourteenth Amendment to the Constitution of the United States and Articles I, VI, X, XII, and XIX of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts.

4. Article 57 does not violate any provision of the Constitution of the United States.

5. Article 57 does not violate any provision of the Constitution of the Commonwealth of Massachusetts.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss.

Superior Court
Civil Action
No. 15,596
Ford, J.
11/8/82

GEORGE DOBSON
Plaintiff

vs.

OCEAN STREET CANTEEN, INC.
Defendant

JUDGMENT

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

The defendant Ocean Street Canteen, Inc. is ordered to cease and desist forthwith from operating coin-activated amusement devices on the premises at Marshfield Plaza East in the Town of Marshfield.

By the Court
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss

Superior Court
Civil Action
No. 15,596
Ford, J.
11/8/82

GEORGE DOBSON,
Plaintiff
vs.
OCEAN STREET CANTEEN, INC.
Defendant

JUDGMENT ON COUNTER-CLAIM

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

1. The Marshfield Zoning Bylaw is a valid exercise of the power granted to the Town under the Zoning Enabling Act and the Home Rule Amendment to the Constitution of the Commonwealth of Massachusetts.

2. The Zoning Bylaw is not in conflict with any statute, of the Commonwealth of Massachusetts.

3. The Zoning Bylaw prohibits the operation of coin-activated amusement games as an accessory use.

4. The Zoning Bylaw does not violate any provision of the Constitution of the United States.

5. The Zoning Bylaw does not violate any provision of the Constitution of Massachusetts.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss

Superior Court
Civil Action
No. 15,597
Ford, J.
11/8/82

GEORGE DOBSON,
Plaintiff
vs.
G. P. PRODUCTIONS, INC. d/b/a
Defendant

JUDGMENT

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

The defendant G.P. Productions, Inc. d/b/a The Road House, is ordered to cease and desist forthwith from operating coin-activated amusement devices on the premises at 1140 Ocean Street in the Town of Marshfield.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss

Superior Court
Civil Action
No. 15,596
Ford, J.
11/8/82

GEORGE DOBSON,
Plaintiff
vs.
G. P. PRODUCTIONS, INC. d/b/a
Defendant

JUDGMENT ON COUNTER-CLAIM

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

1. The Marshfield Zoning Bylaw is a valid exercise of the power granted to the Town under the Zoning Enabling Act and the Home Rule Amendment to the Constitution of the Commonwealth of Massachusetts.

2. The Zoning Bylaw is not in conflict with any statute, of the Commonwealth of Massachusetts.

3. The Zoning Bylaw prohibits the operation of coin-activated amusement games as an accessory use.

4. The Zoning Bylaw does not violate any provision of the Constitution of the United States.

5. The Zoning Bylaw does not violate any provision of the Constitution of Massachusetts.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss

Superior Court
Civil Action
No. 15,593
Ford, J.
11/8/82

GEORGE DOBSON,
Plaintiff
vs.
THOMAS F. VETRA
Defendant

JUDGMENT

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

The defendant Thomas F. Vetra is ordered to cease and desist forthwith from operating coin-activated amusement devices on the premises at 507 Ocean Street in the Town of Marshfield.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss

Superior Court
Civil Action
No. 15,593
Ford, J.
11/8/82

GEORGE DOBSON,
Plaintiff
vs.
THOMAS F. VETRA
Defendant

JUDGMENT ON COUNTER-CLAIM

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

1. The Marshfield Zoning Bylaw is a valid exercise of the power granted to the Town under the Zoning Enabling Act and the Home Rule Amendment to the Constitution of the Commonwealth of Massachusetts.

2. The Zoning Bylaw is not in conflict with any statute, of the Commonwealth of Massachusetts.

3. The Zoning Bylaw prohibits the operation of coin-activated amusement games as an accessory use.

4. The Zoning Bylaw does not violate any provision of the Constitution of the United States.

5. The Zoning Bylaw does not violate any provision of the Constitution of Massachusetts.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss

Superior Court
Civil Action
No. 15,685
Ford, J.
11/8/82

GEORGE DOBSON,
Plaintiff
vs.
BONNIE PARKERS, INC., et als.,
Defendants

JUDGMENT

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

The defendants Bonnie Parkers, Inc., Venus II, Inc. and H. and M. Enterprise, Inc., and each of them, are ordered to cease and desist forthwith from operating coin-activated amusement devices on their premises at Marshfield Plaza East in the Town of Marshfield.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss

Superior Court
Civil Action
No. 15,685
Ford, J.
11/8/82

GEORGE DOBSON,
Plaintiff
vs.
BONNIE PARKERS, INC., et als.
Defendants

JUDGMENT ON COUNTER-CLAIM

This action came on to be heard before me, and upon arguments of counsel, pleadings and agreed statement of facts, it is hereby declared, ordered and adjudged as follows.

1. The Marshfield Zoning Bylaw is a valid exercise of the power granted to the Town under the Zoning Enabling Act and the Home Rule Amendment to the Constitution of the Commonwealth of Massachusetts.

2. The Zoning Bylaw is not in conflict with any statute, of the Commonwealth of Massachusetts.

3. The Zoning Bylaw prohibits the operation of coin-activated amusement games as an accessory use.

4. The Zoning Bylaw does not violate any provision of the Constitution of the United States.

5. The Zoning Bylaw does not violate any provision of the Constitution of Massachusetts.

By the Court,
JOSEPH FORD
Justice of the Superior Court

Entered: November 8, 1982

## APPENDIX E

COMMONWEALTH OF MASSACHUSETTS.
Supreme Judicial Court for the Commonwealth,
At Boston, June 29, 1983

In the Case No. SJC-3043
MARSHFIELD FAMILY SKATELAND, INC. & others

*vs.*

TOWN OF MARSHFIELD
(and five consolidated cases)

pending in the Superior Court for the County of Plymouth Nos. 82-15569; -15864; -15865; -15593; -15596; -15597

ORDER

It is hereby ORDERED, that the November 26, 1982 Order of the Appeals Court enjoining the enforcement of the judgments in Plymouth Superior Court cases numbered 82-1263, 82-1258, 82-1259, 82-1260, 82-1261, and 82-1262 is continued in force and effect until further order of this Court.

By the Court,
*/s/ Patrick J. Hurley*, Clerk.

June 29, 1983

## APPENDIX F

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT
CIVIL ACTION
# 82-15864
# 82-15569
# 82-15593
# 82-15596
# 82-15597
# 82-15685

---

MARSHFIELD FAMILY SKATELAND, INC. et al

Plaintiffs,

V.

TOWN OF MARSHFIELD,

Defendant

AND ALL CONSOLIDATED CASES

---

### STATEMENT OF AGREED FACTS

Plaintiffs Marshfield Family Skateland, Inc. et al., and defendant Town of Marshfield hereby stipulate and agree that the following facts are true and accurate for purposes of this action only. The parties reserve the right to dispute the relevance and legal effect of any facts or document as set forth herein (but not the authenticity of any such document):

I. *The Parties*

1. Plaintiff Marshfield Family Skateland, Inc. ("Skateland") is a Massachusetts corporation with a usual place of business in Marshfield. Skateland operates a roller skating rink open to the public. In addition to the skating rink, Skateland offers skates for rent, a pro shop, a snack bar with a variety of food and drink, a sound system for playing music, and coin-activated amusement games, including those commonly known as video games. There are currently six coin-activated amusement games on Skateland's premises, including two "pinball" games and four video games. One of the video games on Skateland's premises is the game "Kangaroo" made by Atari, Inc., a subsidiary of Warner Communications Company. Skateland first installed coin-activated amusement games in 1975 and has operated six coin-activated amusement games continuously since that time.

2. Thomas F. Vetra is a resident of Marshfield and owns and operates a retail grocery store under the name of Seaside General Store ("Seaside"). Seaside has been in business for over eleven years. In addition to groceries, Seaside sells health and beauty aids, games, penny candy, kites, tickets for the Massachusetts State Lottery, as well as other goods. Seaside maintains a stamp vending machine, a pay telephone, and a coin-operated scale. Seaside also has a television set, a radio and a police scanner. In addition, Seaside maintains four video games, including Pac-Man, and has maintained these games since June, 1982. Prior to the installation of these games, Seaside did not operate coin-activated amusement games. Seaside had contracted with an operator prior to the passage of the by-law in June. Although the contract could have been cancelled, Seaside installed the games after passage of the by-law believing the by-law to be invalid.

3. Ocean Street Canteen, Inc. ("Ocean Street") is a Massachusetts corporation with a usual place of business in Marshfield. Ocean Street operates a restaurant and commissary business. Ocean Street also maintains coin-activated amusement games on its premises. At present, Ocean Street has two games although in the past it has operated as many as nine games. Ocean Street has operated coin-activated amusement games continuously since January, 1982. Prior to the installation of those video games, Ocean Street did not maintain coin-activated amusement games.

4. John D. Gunn is a resident of Marshfield. He is the owner and operator of a retail grocery store under the name of "Paddock Package Store." Paddock Package Store is a convenience market or variety store. It sells food, toiletries, cigarettes, alcoholic beverages, groceries, and other items, Paddock Package Store currently has three video games, including Pac-Man on its premises, although it has had four games in the past. Paddock Package Store has had video games on its premises continuously since May, 1982. Prior to installation, Paddock Package Store did not operate coin-activated amusement games.

5. Bonny Parkers, Inc. d/b/a Rafferty's ("Rafferty's") is a Massachusetts corporation with a usual place of business in Marshfield. Rafferty's is a restaurant and bar. It also holds a license for a juke box and for live entertainment. At present Rafferty's operates only one video game. It first operated coin-activated amusement devices, including pinball machines, in 1971. With the exception of 1980 and 1981, it has operated games since that time.

6. Venus II, Inc. ("Venus II") is a Massachusetts corporation with a usual place of business in Marshfield. Venus II is a restaurant and bar. Venus II has also juke box entertainment, live entertainment, and entertainment by television. Venus II now operates four amusement games, including Pac-Man and

Space Invaders. Venus II has operated coin-activated amusement games including pinball machines, shuffle alleys and the first video game "Pong" since 1971.

7. H & M Enterprises, Inc. is a Massachusetts corporation doing business in Marshfield. H & M Enterprises, Inc. owns and operates the Green Harbor General Store ("Green Harbor") in Marshfield. Green Harbor is a small retail food store or grocery store. In addition to selling groceries, Green Harbor sells liquor, milk and cigarettes. At present, Green Harbor operates two coin-activated amusement games. Green Harbor has operated video games since May, 1982. Prior to installing these video games, Green Harbor did not operate coin-activated amusement games.

8. BP Productions, Inc. d/b/a the Road House ("Road House") is a Massachusetts Corporation with a usual place of business in Marshfield. The Road House is a restaurant and bar. The Road House offers entertainment by means of a juke box, three televisions, music, dancing, and an occasional show featuring live entertainment. At present, the Road House operates four video games, including Ms. Pac-Man and Donkey Kong. The Road House has operated the video games continuously since 1980.

8A. Marshfield Sports Center, Inc. ("Sports Center") is a Massachusetts corporation with a usual place of business in Marshfield. The Sports Center is a public bowling alley. The Sports Center also has pool tables and eight coin-activated amusement games, including "Zaxxon", "Ms. Pac-Man", and "Donkey Kong". The Sports Center has had coin-activated games since 1967 and at least four games since 1975. For the past three years, the Sports Center has had eight games.

9. The Town of Marshfield is a body politic duly organized and existing in the Commonwealth of Massachusetts, Plymouth County.

10. George Dobson is the Inspector of Buildings for the Town of Marshfield and is the individual charged by law with the enforcement of zoning by-laws in the Town of Marshfield.

II. *General By-Law 48 of the Town of Marshfield*

11. Having been advised by Town Counsel in November 1981 that the commercial operation of coin-activated amusement games was a violation of the Marshfield Zoning by-law, the Board of Selectmen ceased issuing licenses for coin-activated amusement games, including video games in 1982. This policy was adopted pending presentation to the Town Meeting of a proposed new zoning by-law. The Selectmen also proposed a new general licensing by-law for the Town Meeting. Copies of both proposed by-laws are annexed hereto as Exhibits A and B respectively.

12. The proposed zoning by-law was defeated by the June 1982 Town Meeting. At the same Town Meeting, a substitute general by-law was offered to replace the one proposed by the Selectmen. The substitute proposal was offered by a citizen of the town, Thomas R. Jackson. The motion to substitute was passed by a vote of 191 to 19 and General By-Law # 48 was approved by voice vote.

13. General By-Law # 48 provides as follows:

> (1) No person shall keep, or cause to be kept, operate or suffer to be operated, on premises owned or leased by him, or subject to his control, any mechanical or electronic automatic amusement device, whether coin-operated or not, (as defined under, but not limited to, Chapter 140, Section 177A(2) of the Massachusetts General Laws) except private in-home use, coin-operated juke boxes, pool, billiard, bowling and athletic training devices.

(2) Any person found violating the provisions of this by-law will be punished by a fine of $200 for each offense.

A true copy of General By-Law # 48 is annexed hereto as Exhibit C.

14. On or about September 30, 1982, the Attorney General, pursuant to G.L. Ch. 40, § 32, approved General By-Law # 48.

15. On October 5, 1982, the Chief of Police of Marshfield inspected the plaintiffs' business premises. Since the plaintiffs were still operating video games, the Chief of Police informed them that he intended to commence enforcement proceedings, which could include the seizure of the games, if the games were not removed.

16. On October 6, 1982, Civil Action # 82-15864 was commenced to seek injunctive and declaratory relief.

III. *Zoning Cases*

17. After the defeat of the proposed change to the Zoning By-law by the June 1982 Town Meeting, the Inspector of Buildings determined to enforce the Zoning By-Law that he had been advised prohibited all coin-activated amusement games. Prior to the commencement of these actions, no enforcement proceedings had ever been brought against the commercial operation of coin-activated amusement games in the Town.

18. The present Marshfield Zoning By-Law was adopted on June 12, 1972.

19. Article 5 of the Marshfield Zoning By-Law sets forth uses that are permitted, uses that are prohibited in certain zones, and uses permitted by special permit or exception.

20. Section 5.01 of the Marshfield Zoning By-Law states as follows: "Except as provided in the Zoning Enabling Act or in this By-Law, no building, structure, or land shall be used except for the purposes permitted in the district as described in this Section. Any use not listed shall be construed to be prohibited."

21. Immediately after section 5.04, the Marshfield Zoning By-Law lists 67 principal residential, community, agricultural, retail and service, and wholesale, transportation, and industrial uses. Immediately following the listing of the aforementioned principal uses, the Marshfield Zoning By-Law lists 17 accessory uses. Since the adoption of the Zoning By-Law, the Town Meeting has amended the By-Laws by adding additional uses under the Table of Accessory Uses.

22. Article 2 contains the following definitions:

a) Use: the purpose for which a structure or lot is arranged, designed, or intended to be used, occupied or maintained.

b) Use, Accessory: a use incidental and subordinate to the principal use of a structure or lot, or a use, not the principal use, which is located on the same lot as the principal structure. Accessory use by area shall be interpreted not to exceed 40% of the area to the total use of the structure and/or lot on which it is located.

c) Use, Principal: the main or primary purpose for which a structure or lot is designed, arranged, or intended, or for which it may be used, occupied or maintained under this By-Law. Any other use within the main structure or the use of any other structure or land on the same lot and incidental or supplementary to the principal use and permitted under this By-Law shall be considered an accessory use.

23. A complete copy of the Zoning By-Law for the Town of Marshfield is annexed hereto and incorporated herein as Exhibit D.

24. On or about July 22, 1982, George Dobson, as Inspector of Buildings, served a Notice of Zoning Violation and Order upon Thomas F. Vetra, Ocean Street, John D. Gunn, Rafferty's, Venus, Green Harbor and The Road House.

25. A representative copy of the notice of zoning violation and order is annexed hereto and incorporated herein as Exhibit E.

26. Thomas F. Vetra, Ocean Street, John D. Gunn, Rafferty's, Venus II, Green Harbor, and The Road House did not cease to operate their coin-activated amusement games in response to the notice issued by George Dobson.

27. In August, 1982, George Dobson commenced these actions seeking to enforce his interpretation of the Marshfield Zoning By-Law.

IV. *Video Games*

28. A video game is a coin-activated amusement game. A video game is typically built in an upright wooden cabinet approximately 70 inches in height, 25 inches in width, and 36 inches in depth. Other models include smaller cabinets and cocktail table games.

29. The component parts of a video game are a microprocessor (a computer), electronic control circuitry, a television monitor, and a control panel for player operation. In the play mode, after a coin is deposited and the controls are operated by the game player, the computer is programmed to combine with the electronic control circuitry to produce a continuous audio-visual display.

30. The television monitors used with video games differ from a home television screen in their ability to intensify colors and lines to produce a clearer and more distinct image.

31. The video games' computer program today is fixed in a memory device known as a ROM (read only memory). The computer program in the ROM contains all of the instructions for the computer to follow in response to each movement of the game controls by the player. ROMs are typically one inch ½ inch, dark ceramic material with pins coming out of it.

32. When the player operates the controls, the movement is transmitted by the micro-processors and is analyzed in accordance with the program contained in the ROM. The microprocessor then immediately determines the proper instruction to be transmitted to the RAM (random access memory), which is a second memory device contained within the machine.

33. The RAM contains the codes for the pictures that are to be reproduced on the screen, and contains in its memory the instructions for reproducing every visual image on the screen.

34. The electronic circuitry in a video game enables the player controls, the ROM, the RAM, and the video screen to interact instantaneously, thereby producing the continuous visual display.

35. All video games combine visual images with sound effects, including tones and, occasionally, speech. Each machine contains audio-generation circuitry that produces the sound effects required by the video game program. The sounds are selected by the program and are reproduced through the electronics in the game.

36. Each video game has two basic modes: an attract mode and a play mode.

37. The attract mode is a fixed sequence of events, usually showing the player the name of the game, the copy-right, how to play the game, and a table of high scores. The sequence of events in the attract mode is programmed in the ROM and will not change until the player deposits a coin to change the mode into the play mode.

38. The video game "Pac-Man" is manufactured by the Midway Manufacturing Company. Pac-Man is one of the most popular video games ever to be produced. Since its release in 1980, over 95 thousand Pac-Man machines have been manufactured, far above average production. In 1981, Midway Manufacturing Company made the video game "Ms. Pac-Man". Over 100,000 Ms. Pac-Man games have been sold.

39. In the Pac-Man game, the television screen depicts a maze with dots placed in the paths. Pac-Man is a round, yellow image with a mouth-like opening that can be controlled by the player and moved throughout the maze. When the mouth-like opening intersects with the dots, the dots disappear from the screen. Four so-called ghost images also appear on the screen. When these images intersect with the Pac-Man image, the Pac-Man whines, deflates and then disappears with a star burst.

40. Each ghost image has a different color, is given a name and is programmed to respond differently. For example, the light blue ghost image (named "Inky") is programmed to avoid face to face confrontations with the Pac-Man image. The red ghost image (named "Blinky") is programmed to follow consistently the Pac-Man image throughout the maze.

41. Each ghost image has moving eyes that tell the player the direction in which the ghost character is moving.

42. The object of the Pac-Man game is to have Pac-Man clear the maze of all the dots to score points, eat fruit symbols that are displayed at random in the maze to score points, and to avoid being caught by the ghost figures.

43. At four points on the maze are enlarged dots called power capsules. If Pac-Man eats a power capsule, the roles reverse; the ghosts turn blue and Pac-Man can eat and deflate the ghosts. Points are scored for each successive ghost eaten. If a ghost is eaten, only its eyes remain and they then go back to the ghost "pen" in the center of the maze and the ghost char-

acter is regnerated. After a specified period of time, the ghosts will flash from blue to their normal colors signifying that the ghosts are about to become hunters again.

44. When the Pac-Man has cleared an entire screen of the dots, the movement stops for a moment and a new screen will appear for another round. Each round is identified by a fruit symbol at the bottom of the screen. After a certain number of mazes have been cleared, both Pac-Man and Ms. Pac-Man games display an interlude with music. These interludes have been called "Half-Time" by the manufacturer of the games.

45. Upon deposit of a quarter, the player starts with three Pac-Man characters and an additional Pac-Man is awarded as a bonus after the player has amassed ten thousand points. The basic principles of play are the same for both Pac-Man and Ms. Pac-Man. Both games use a single, moveable knob or "joystick" for the player control. Attached as Exhibit F is a photograph of the Pac-Man game. Exhibit G is a photograph of the Pac-Man maze. Exhibit H is a photograph of the Ms. Pac-Man game. Exhibit I is a photograph of the Ms. Pac-Man maze.

46. The attract mode in the Pac-Man game shows the four ghosts figures and introduces them by name. After the introduction, the attract mode shows a sequence of Pac-Man eating and being pursued by the ghosts. Pac-Man, like other video games, has a mechanism whereby the player can record his or her high score in the computer's memory. The computer displays these high scores as a permanent record and these high scores are displayed in the attract mode. The Ms. Pac-Man attract mode is similar to the Pac-Man attract mode.

47. The video game "Donkey Kong" is manufactured by Nintendo of America, Inc.

48. In Donkey Kong, a gorilla is depicted taking a woman figure to the top of a sky scraper.

49. The player controls the figure of a character named Mario. The player must maneuver Mario to climb ladders and other objects to rescue the woman while avoiding barrels, fireballs and other hazards placed in his path by the gorilla. The player controls the movement of Mario with a joystick and can press a button to make Mario jump or catch objects.

50. The video game "Zaxxon" is manufactured by Gremlin Industries, Inc., a subsidiary of Gulf and Western Industries, Inc.

51. In Zaxxon, the player maneuvers an aircraft through a simulation of space and a fortress. Along the flight, the player must avoid obstacles, shoot at various objects for points and watch over an altitude gauge and fuel supply indicator. If the player successfully avoids these pitfalls, the player is confronted with a robot-like object with a homing missile. Annexed hereto as Exhibit J is a picture of the game Zaxxon. Exhibit K is a picture of Zaxxon's video screen.

52. The video game "Tron" is manufactured by the Midway Manufacturing Company, a Bally Company.

53. In Tron, the player selects from four modes of play. Two modes include a tank chase in a maze and a player maneuvering a figure into a safe core area. At the beginning and conclusion of each mode, the player selects the next mode from the grid that appears on the screen.

54. The video game "Kangaroo" is manufactured by Atari, Inc., a subsidiary of Warner Communications Company.

55. In Kangaroo, the player must maneuver a Kangaroo to rescue her baby who is being held captive at the top of the screen by small monkeys. The player uses a joystick to move the Kangaroo to jump over obstacles and to duck apples hurled by the monkeys. The player may press a button to enable the Kangaroo to "punch" out the monkeys.

56. Ms. Pac-Man, Donkey-Kong, Zaxxon, Tron and Kangaroo are considered to be among the most sophisticated

games available. Donkey-Kong and Kangaroo are examples of what the industry refers to as "thematic games" while Zaxxon is an example of what is referred to as a "shoot 'em up" game.

V. *The Amusement Game Industry*

57. The Amusement Game Industry has traditionally been divided into four tiers: manufacturer, distributor, operator, and location owner. This structure has remained, even with the advent of new video game products.

58. At the manufacturing level, companies design, develop, and assemble the games. The production of a video game is typically a joint effort of a design team. Each team usually has a graphics designer, an animator, a composer, an engineer, and a computer programmer. Game ideas must first be developed, translated into a computer program, manufactured into a prototype, tested, and then mass produced and marketed. Each manufacturer devotes millions of dollars to the research and development of a single game.

59. Manufacturers estimate that there are approximately one billion dollars worth of games in current operation. Some of the principal manufacturers of coin-activated amusement games are subsidiaries of entertainment companies such as Warner Communications, Inc. (Atari, Inc.) and Gulf and Western Industries, Inc. (Gremlin Industries, Inc.).

60. The manufacturers sell their products to regional distributors. Distributors are the sales representatives for the manufacturers of the equipment. The distributors sell and service the equipment. Distributors typically sell games for between $2,000 and $3,000. In this region, the primary distributors of coin-activated amusement games are Bally Northeast Distributing Manufacturing Company, Inc. and Rowe International, Inc. in Dedham, Massachusetts, a subsidiary of Triangle Industries.

61. Distributors usually sell coin-activated amusement games to operators. Operators are typically vending companies that supply equipment to locations on a lease or commission basis. Usually, title to the equipment remains vested in the operator, the operator services the equipment, and rotates equipment along its vending route from one location to another.

62. The location owner is responsible for supervising the use of the equipment on its premises. The gross receipts of a video game are usually divided between operator and location owner on an agreed upon basis, either in the form of a commission or as a lease payment. Industry surveys estimate that in 1982, players spent between five and eight billion dollars on coin-activated amusement games.

63. Replay Magazine, a coin-activated amusement game industry trade journal, has estimated in a survey that sixteen percent of the video game-playing market is under age 13, forty-two percent is between 13 and 19, twenty-nine percent is between 20 and 30, and thirteen percent is over the age of 30.

64. Replay Magazine has found in a survey of operators that the most desirable and profitable locations for the placement of coin-activated amusement games from the operators' perspective are arcades (featuring only coin-activated amusement games), other recreation centers like bowling alleys and movie theatres, restaurants and bars, and in variety stores.

VI. *Miscellaneous*

65. The Town of Marshfield is a predominately middle to upper-middle class surburban community located on the coast, thirty miles south of Boston. The year round population of the town is about 21,000 people. Marshfield is also a summer resort community. Summer residents number about 15,000 people, bringing total population during the summer

months to about 36,000. Virtually all of the summer population increase occurs in the beach areas of the town. Five of the nine businesses that are parties herein are located in the beach areas of the town.

66. Various entertainments are offered to the public in Marshfield. Each summer, there is the Marshfield Fair, which has included a tent containing coin-activated amusement games among its attractions. The Marshfield Jaycees operate a "haunted house" for a week and the Boston Celtics have held training camps at Camp Milbrook in Marshfield. The Elks have run "Las Vegas" nights.

67. Many permanent facilities offer forms of entertainment to the public.

68. In 1982, Noah's Oceanside, Inc., 26 Old Beach Road, was given a common victualler's license, an all-alcoholic beverage license, a license for dancing, and a license for a juke box.

69. The Brothers Four, Inc. d/b/a The Ranch House, on 222 Canal Street, received a license in 1982 as a common victualler, licenses for dancing, for an orchestra and a juke box, and a license for pool tables.

70. Papa Gino's of America, Inc., 1897 Ocean Street, was licensed in 1982 as a common victualler and also has a juke box license. Papa Gino's has held these licenses continuously since 1976.

71. The Shoals Restaurant, Inc. d/b/a The Shoals, 915 Ocean Street, was licensed as a common victualler, was granted a juke box license, and a license for dancing. The Shoals has been conducting these activities since 1976.

72. Sullivan's Fairview Hotel, 133 Ocean Street, was given a license in 1982 as an innholder, a common victualler, and received a license for a juke box.

73. The Marshfield Breakers, Inc., 247 Ocean Street, has a seasonal alcoholic beverages license, is licensed as common

victualler, and has licenses for dancing, juke box and an orchestra. These licenses have been outstanding since 1976.

74. The Brideway Inn, Inc. on Sea and Ferry Streets, has been licensed as an innholder, as a common victualler, maintains an innholder's all-alcoholic license, and is licensed for dancing. This establishment also had these licenses in 1981.

75. The Casa Berrini has an all-alcoholic beverages license, a common victualler's license, a dancing license, a juke box and an orchestra license. These licenses have been outstanding since 1980.

76. Burke's Beach Trust on Beach Street has a common victualler's license and a juke box license. These licenses have been outstanding since 1976.

77. No enforcement proceedings have been brought and no enforcement proceedings are pending against any of these establishments.

Respectfully submitted,

/s/ *Robert Marzelli*

Robert Marzelli
Billingham & Marzelli
95 Church Street
Pembroke, MA 02358
Tel: 826-8411
Attorney for Defendant
Town of Marshfield

/s/ *Ira H. Zaleznik*

Ira H. Zaleznik
Lappin, Rosen, Goldberg,
Slavet, Levenson & Wekstein
One Boston Place
Boston, MA 02108
Tel: 437-1000
Attorney for Plaintiffs

# No. 83-535

Supreme Court, U.S.
FILED
NOV 8 1983
ALEXANDER L. STEVAS,
CLERK

# In the Supreme Court of the United States

October Term, 1983

**MARSHFIELD FAMILY SKATELAND, INC., THOMAS F. VETRA, OCEAN STREET CANTEEN, INC., BONNIE PARKERS, INC., VENUS II, INC., H & M ENTERPRISES, INC., BP PRODUCTIONS, INC., and MARSHFIELD SPORTS CENTER, INC.,**

*Appellants,*

vs.

**TOWN OF MARSHFIELD,**

*Appellee.*

On Appeal From The Supreme Judicial Court For The Commonwealth Of Massachusetts

## MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

IRA H. ZALEZNIK
BARRY E. ROSENTHAL
VALERIE L. PAWSON
LEWIN & ROSENTHAL
63 Atlantic Avenue
Boston, Massachusetts 02110
(617) 227-9400

JONATHAN T. HOWE
BARRY SULLIVAN*
DONALD J. RENDALL, JR.
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

*Attorneys for Appellants*

* Counsel of Record

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

## TABLE OF AUTHORITIES

*Cases*


| | PAGE |
|---|---|
| Cohen v. California, 403 U.S. 15 (1971) | 3 |
| Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) | 3 |
| Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) | 3 |

# In the
# Supreme Court of the United States

OCTOBER TERM, 1983

## No. 83-535

**MARSHFIELD FAMILY SKATELAND, INC., THOMAS F. VETRA, OCEAN STREET CANTEEN, INC., BONNIE PARKERS, INC., VENUS II, INC., H & M ENTERPRISES, INC., BP PRODUCTIONS, INC., and MARSHFIELD SPORTS CENTER, INC.,**

*Appellants,*

VS.

**TOWN OF MARSHFIELD,**

*Appellee.*

On Appeal From The Supreme Judicial Court For The Commonwealth Of Massachusetts

## MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellants respectfully submit this memorandum in reply to appellee's motion to dismiss or affirm.

1. Appellee asserts (M.D. 11-12)[1] that probable jurisdiction should not be noted because the issues presented on

[1] The motion to dismiss or affirm will be referred to herein as "M.D." The jurisdictional statement and the appendix annexed thereto will be referred to as "J.S." and "J.S. App.," respectively.

appeal are "cloudy and imprecise." Appellee's contention rests on the fact that the Supreme Judicial Court affirmed six judgments entered by the Superior Court, and that five of those judgments were entered in cases originally brought under the Marshfield Zoning By-Law, shortly before the effective date of General By-Law No. 48. Appellee contends that this fact should somehow insulate from review the judgment of the Supreme Judicial Court upholding the constitutionality of General By-Law No. 48. That contention, however, is wide of the mark. As we have previously noted (J.S. 4 n.2), no action was brought under the Marshfield Zoning By-Law against appellants Marshfield Family Skateland, Inc. or Marshfield Sports Center, Inc. Their rights were therefore determined in the Superior Court exclusively under General By-Law No. 48. Moreover, the Supreme Judicial Court affirmed all of the judgments on the express ground that they were supported by General By-Law No. 48. As the Supreme Judicial Court explained (J.S. App. 4), "[s]ince we uphold the express prohibition of coin-activated amusement devices under General By-Law No. 48, we need not address the issues raised with regard to the more general provisions of the 1972 zoning by-law." The constitutionality of General By-Law No. 48 is therefore squarely presented.

2. Contrary to appellee's assertion (M.D. 14-15), the record amply supports appellants' description of the video games at issue (J.S. 4-5) as well as appellants' contention (J.S. 12) that "video games are a technologically sophisticated medium through which an author's ideas and fantasies are expressed and communicated to the public." The Statement of Agreed Facts (J.S. App. 40-56), upon which the case was submitted to the Superior Court, describes in detail six video games, including the method of their creation and manufacture (J.S. App. 47-48, 53), the manner in which they are played (J.S. App. 48-49), and

the creative plots which the games communicate (J.S. App. 49-52). In addition, the record includes a videotape demonstration and written explanation of five video games (*see* J.S. 6 n.4).

3. Similarly, there is no merit to appellee's contention (M.D. 15) that video games are not protected by the First Amendment because they are not a "recognized generic form of communications media." The First Amendment clearly affords protection to non-obscene, expressive entertainment, whether the medium be traditional or novel, sophisticated or rudimentary. *See, e.g., Schad* v. *Borough of Mt. Ephraim,* 452 U.S. 61, 65-66 (1981); *Cohen* v. *California,* 403 U.S. 15, 24-26 (1971); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501-03 (1952). Finally, appellee's reference (M.D. 10-11) to changing technology lends no support to its contention that the issues presented are unworthy of this Court's attention, but merely serves to underscore the practical importance of this case.

It is respectfully submitted that the motion to dismiss or affirm should be denied and probable jurisdiction noted.

IRA H. ZALEZNIK
BARRY E. ROSENTHAL
VALERIE L. PAWSON
LEWIN & ROSENTHAL
63 Atlantic Avenue
Boston, Massachusetts 02110
(617) 227-9400

JONATHAN T. HOWE
BARRY SULLIVAN*
DONALD J. RENDALL, JR.
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

*Attorneys for Appellants*

* Counsel of Record

DATED: November 8, 1983